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82-816
No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOHN BROZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services may rely upon medical-vocational guidelines, rather than individualized proof, to determine the effect of age on claims for disability benefits under the Social Security Act.

PARTIES TO THE PROCEEDINGS

John Broz, Richard D. Holmes, Corinne Little, Thomas O. Jones, and Fred Soesbe were appellees in the court of appeals and are respondents in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOHN BROZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-22a) is reported at 677 F.2d 1351. The judgments of the district court (App. B, *infra*, 23a, 39a, 53a, 68a, 84a) are unreported. The decisions of the Social Security Administration Appeals Council (App. C, *infra*, 101a-110a) and the Administrative Law Judges (App. D, *infra*, 111a-164a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 165a-166a) was entered on June 7, 1982. A petition for rehearing was denied on August 16, 1982 (App. E, *infra*, 167a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Title II of the Social Security Act (42 U.S.C. 405(a) and 42 U.S.C. (& Supp. IV) 423(d)) and the applicable regulations (20 C.F.R. 404.1545; 20 C.F.R. 404.1560 to 404.1569; and 20 C.F.R. Part 404, Subpart P, App. 2) are reproduced in Appendix F (81-1983 Pet. App. 34a-75a) to the petition for a writ of certiorari in *Schweiker* v. *Campbell*, cert. granted, No. 81-1983 (June 21, 1982).[1]

STATEMENT

1. This case concerns the validity of the age classifications made in the Social Security Administration's medical-vocational guidelines for determining entitlement to disability benefits. 20 C.F.R. Part 404, Subpart P, App. 2. A closely related question concerning the validity of the guidelines is now before this Court in *Schweiker* v. *Campbell*, cert. granted, No. 81-1983 (June 21, 1982). The government's petition in *Campbell* describes the operation of the guidelines and the disability provisions of Title II of

[1] Copies of the Secretary's petition and brief in *Campbell* have been sent to counsel for respondents.

Although respondents Holmes (App. D, *infra*, 120a), Little (App. D, *infra*, 135a), and Soesbe (App. D, *infra*, 157a) filed claims for Supplemental Security Income ("SSI") under Title XVI of the Act, 42 U.S.C. (& Supp. IV) 1381 *et seq.*, as well as claims for disability benefits under Title II (the Federal Old-Age, Survivors, and Disability Insurance Program), 42 U.S.C. (& Supp. IV) 401 *et seq.*, the court of appeals did not discuss the regulations applicable under Title XVI. For that reason, we speak throughout this brief only of Title II and do not reproduce the corresponding provisions of Title XVI and its applicable regulations. We note, however, that any decision regarding Title II would apply perforce to Title XVI. The statutory provisions are parallel (compare 42 U.S.C. 1383(d)(1), (e)(1), with 42 U.S.C. 405(a) and 42 U.S.C. (Supp. IV) 423(d)(5)), the regulations are virtually identical (compare 20 C.F.R. 416.945, 416.960 to 416.969 with 20 C.F.R. 404.1545, 404.1560 to 404.1569), and the guidelines in 20 C.F.R. Part 404, Subpart P, App. 2—which are at issue in this case—are incorporated by reference in 20 C.F.R. Part 416, Subpart I. See 20 C.F.R. 416.969.

the Social Security Act in some detail (81-1983 Pet. 2-7). We limit our discussion here to a description of the age classifications invalidated by the court of appeals.

Title II of the Social Security Act provides disability benefits to individuals who, because of a physical or mental impairment, are unable to do their previous work or to "engage in any * * * kind of substantial gainful work which exists in the national economy * * *." 42 U.S.C. 423(d)(2)(A).[2] In determining whether a claimant is disabled, the Act requires the Secretary of Health and Human Services to consider—in addition to a claimant's physical and mental impairments—his age, education, and work experience. *Ibid.* The medical-vocational guidelines were promulgated to govern the interplay of those factors in disability determinations. The effect that age should have on such cases was decided in a rulemaking proceeding on the basis of data dealing with the relationship of age and employment, and on the expertise the Social Security Administration had acquired from its operation of the disability programs. 43 Fed. Reg. 55353-55355 (1978).

The inquiry that preceded promulgation of the regulations revealed that employment problems begin to develop at age 45 and intensify at age 55 (43 Fed. Reg. 55354 (1978)). Because the adverse effect of increasing age occurs gradually, the guidelines establish classifications in five-year intervals reflecting the increasing significance of age at 45, 50, 55, and 60. See 20 C.F.R. 404.1563. They provide, for example, that all claimants over 55 who are severely impaired, and have limited education and no work experience, are disabled regardless of their residual functional capacity. 20 C.F.R. Part 404, Subpart P, App. 2, Tables 1, 2, and 3, Rules 201.01, 202.01, 203.01. They also

[2] The Act's definition of disability is the same for both Title II and Title XVI. Compare Section 223(d) of Title II, 42 U.S.C. (& Supp. IV) 423(d), with Section 1614(a)(3) of Title XVI, 42 U.S.C. (& Supp. IV) 1382c(a)(3).

provide that all impaired claimants over 50 who are illiterate and unskilled are disabled, unless they have at least the residual functional capacity to do medium work. See Rules 201.09, 202.09, 202.18. The regulations specifically provide, however, that the age categories will not be applied "mechanically in a borderline situation." 20 C.F.R. 404.1563(a).

2. Respondents' claims for disability benenfits were denied by the Social Security Administration initially and upon reconsideration. After hearings in each case, administrative law judges ("ALJs") concluded that respondents were not disabled. They found that while respondents were unable to do their past jobs, they were able to perform at one of the levels of restricted work encompassed by the guidelines and tables in Appendix 2. The ALJs made findings as to respondents' age, education, and work experience. On the basis of these findings, the ALJs applied rules in the tables in Appendix 2 which directed conclusions that respondents were not disabled (App. D, *infra*, 117a-118a, 132a, 142a, 154a, 163a-164a). The Appeals Council denied review (App. C, *infra*, 101a-110a).

Respondents then sought judicial review in the United States District Court for the Southern District of Alabama. In each case, the court adopted the recommendation of a magistrate holding the guidelines invalid and remanding the claim to the agency (App. B, *infra*, 23a, 39a, 53a, 68a, 84a). According to the magistrate's recommendations, the administrative notice underlying the guidelines conflicts with 42 U.S.C. (Supp. IV) 405(b), which provides that eligibility determinations shall be based on evidence "adduced at the hearing," and with the Administrative Procedure Act, 5 U.S.C. 556(e), which provides that an agency basing its decision on adjudicative notice of facts not appearing in the record must permit parties an opportunity to respond to such facts (App. B, *infra*, 34a-36a, 49a-51a, 64a-66a, 80a-82a, 98a-99a).

3. Respondents' cases were consolidated on appeal (App. A, *infra*, 2a). Although the court of appeals relied on different grounds than the district court, it too invalidated in

part the guidelines in Appendix 2.[3] The court of appeals found that the portions of the regulations dealing with residual functional capacity, education, and work experience are valid, because they leave open for adjudication in each case the precise effect that an individual's physical and mental limitations and job skills have on his ability to do a job (App. A, *infra*, 11a-12a). The court held, however, that the regulations are invalid insofar as they make the claimant's entitlement to disability benefits turn on his chronological age. The court noted that underlying the regulations is the "premise that, at a certain point, age significantly restricts a worker's ability to adapt and adjust to a new job and a new working environment" (*id.* at 12a). But it would not always be true, the court said, that that ability would be more restricted for a person 50 years old than for one 49 years old. Because the impact of age may vary from one case to another, the court concluded, it is a matter of adjudicative fact, and not within the rule-making power given to the Secretary by 42 U.S.C. 405(a) and 42 U.S.C. (Supp. IV) 423(d)(5). App. A, *infra*, 13a-14a. Accordingly, the court remanded respondents' claims to the agency for individual consideration of the effect that each claimant's age had on his or her ability to adapt to new jobs (*id.* at 15a, 22a).[4]

[3] The court of appeals did not find that the guidelines furnished evidence in violation of 42 U.S.C. (Supp. IV) 405(b); rather, the court concluded that they established rules governing the ultimate conclusion in disability cases. It noted, moreover, that Section 556(e) of the Administrative Procedure Act—relied upon by the district court—applies to adjudication but not to rulemaking (App. A, *infra*, 15a-19a).

[4] Although it held that "the Secretary has exceeded the authority conferred by the statute because the regulations determine an adjudicative fact" (App. A, *infra*, 13a), the court concluded that it could "uphold the regulations as written" if "individual consideration [were given to] the age-adjustment factor" (*id.* at 15a). The court went on to suggest that the Secretary might consider age as a "nonexertional impairment that significantly limits basic work skills, [in which case] the grids are inapplicable" (*ibid.*). But since the very point of the guidelines is to make disability determinations more rational and consistent by use of "the grids," it is difficult to see how this proposal amounts to "uphold[ing] the regulations as written." It is true that an individual claimant afflicted prematurely with impairments usually associated

REASONS FOR GRANTING THE PETITION

The issue in this case, though distinct in some respects, is substantially similar to that presented in *Schweiker* v. *Campbell*, *supra*. In each case the court of appeals held the medical-vocational guidelines invalid for failure to permit individualized proof of an issue the guidelines were designed to remove from adjudication. Each decision rests on the erroneous premise that the Secretary, in promulgating the guidelines, exceeded the rulemaking authority conferred on him by Congress with regard to the disability program.[5]

1. The statutory definition of "disability" requires that a claimant must have a physical or mental impairment so severe

> that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *.

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with age (e.g., arthritis, or premature senility) could prove that he had nonexertional limitations, and thereby obtain a determination of disability to which his age would not otherwise entitle him. See pages 9–10, *infra*. But the court's suggestion appears to place upon the Secretary the obligation of proving in each case that the mental and physiological effects of senescence on the claimant do not entitle him to benefits. As the court noted, "[a] claimant must first show an impairment serious enough to prevent work in his * * * previous job. Here the burden of proof is on the claimant. * * * If this burden is met the burden shifts to the Secretary to prove that the claimant 'cannot, considering his age, * * * engage in any *other* kind of substantial gainful work'" (App. A, *infra*, 4a) (emphasis in original). Presumably, if age means physiological age, it is the effect of *that* condition on the claimant's work possibilities which the Secretary must prove.

[5] The issue of this case is also related to an issue presented in *Kirk* v. *Schweiker*, petition for cert. pending, No. 81-6754 (filed May 20, 1982). Petitioner in that case contends not that the Secretary lacks statutory authority under 42 U.S.C. 405(a) and 42 U.S.C. (& Supp. IV) 423(d) to promulgate the age guidelines, but that the age categories embodied in the guidelines are not supported by valid data correlating age with the ability to perform specific jobs (81-6754 Pet. 2-3 (Question IH), 19). The government has suggested that the Court dispose of the petition in *Kirk* as appropriate in light of its decision in *Campbell*.

42 U.S.C. 423(d)(2)(A). In *Schweiker* v. *Campbell*, *supra*, the Second Circuit held that the Secretary, in determining whether there is "work which exists in the national economy" that a disability claimant can perform, is not entitled simply to rely on the tables in Appendix 2. Rather, the court held, the Secretary must "'identify specific alternative occupations available in the national economy that would be suitable for the claimant'" and give for each "'a job description clarifying the nature of the job, [and] demonstrating that the job does not require' exertion or skills not possessed by the claimant" (81-1983 Pet. App. 9a, quoting *Decker* v. *Harris*, 647 F.2d 291, 298 (2d Cir. 1981)). The Secretary's brief in *Campbell* argues that the very purpose of the regulations is to determine conclusively the types and numbers of occupations available, and their suitability for claimants whose medical and vocational characteristics are described in the tables (81-1983 Pet. Br. 9).

The court of appeals in this case held that the Secretary, in giving the "consider[ation]" to "age" that the statute requires, is not entitled simply to rely on the chronological divisions drawn by the tables in Appendix 2. Rather, the court held, age is "an adjudicative factor and therefore must be given individual consideration through adjudication rather than legislative resolution through rulemaking" (App. A, *infra*, 14a). Though the decision below focused on a different component of the statutory term "disability" than did the Second Circuit in *Campbell*,[6] the decisions share the common conclusion that the Social Security Act somehow precludes the Secretary from declaring in regulations the effect that nonmedical factors should have on the evaluation of disability. There is no indication in either the language of the statute or its legislative history that the scope of rulemaking authority is more restricted in one case than in the other. Indeed, both *Campbell* and this case deal with disability requirements found in the same sentence of the statute (42 U.S.C. 423(d)(2)(A)), and implemented by

[6] Indeed, the court of appeals expressly stated its disagreement with the Second Circuit's conclusion that the Secretary must identify "particular jobs that a claimant is capable of performing" (App. A, *infra*, 16a n.12.).

the same guidelines (20 C.F.R. Part 404, Subpart P, App. 2); and in each case the Secretary's authority to make rules derives from the same statutory provisions (42 U.S.C. 405(a); 42 U.S.C. (Supp. IV) 423(d)(5)). Under these circumstances, a reversal in *Campbell* would cast serious doubt on the correctness of the decision in this case.

2. The decision below is clearly erroneous. Congress specifically stated in the Act that the Secretary should "consider[] [a claimant's] age" in making disability determinations. 42 U.S.C. 423(d)(2)(A). Yet the court of appeals stated that the Secretary could not "determine that a person 49 years of age is able to adjust to a new unskilled sedentary occupation but that a person 50 years old is not[,] * * * [because] a person's ability to adapt or adjust is clearly a fact relating to the individual claimant" (App. A, *infra*, 13a). It is difficult to believe that when Congress used the word "age" in the statute it had in mind anything other than chronological age. However, the court of appeals' decision in effect requires the Secretary to base disability determinations not on chronological age, but on the unique effects that the passage of time has had on the individual claimant—i.e., on his "physiological" age.

It was plainly unwarranted for the court to invalidate the regulations insofar as they preclude an investigation into that question, given the "legislative effect" to which the regulations are entitled. *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977). As the First Circuit held in *Fogg* v. *Schweiker*, No. 81-1232 (Oct. 13, 1981), slip op. 9 n.5:[7]

> Had Congress purposely intended to refer to physiological age, it * * * would have signalled this departure from the expected by clearer language. Instead Congress simply noted that age was a relevant factor and accorded the Secretary broad powers to issue regulations which would take age into account as a part of disability. 42 U.S.C. § 423(d)(2). We cannot find that the Secretary exceeded his powers by contravening Congressional intent.

[7] We are lodging a copy of the First Circuit's opinion in *Fogg* with the Clerk of the Court and sending a copy to counsel for respondents.

It is true that in drafting the guidelines dealing with age, the Secretary recognized that there were physical and mental consequences of senescence, and that those consequences made age significant, because they were likely to affect claimants' ability to adapt to new jobs. 43 Fed. Reg. 55359 (1978). The available data did not, however, "relate varying specific chronological ages to specific physiologically-based vocational limitations for performing jobs" (*ibid.*). As a result, the regulations rely on data dealing with, for example, the rate by age of participation in the labor force, the unemployment rate by age, the duration of unemployment by age, and the proportion of hires to applicants by age (*id.* at 55353-55354). The court of appeals concluded that the lack of scientific data on the relation between the physiological consequences of aging and job performance was itself an argument for case-by-case determination of the effect those facts had on disability (App. A, *infra*, 14a). But what it shows even more clearly is the wisdom of Congress in directing the Secretary to consider chronological age in making disability determinations. Any attempt to account in individual cases for the innumerable consequences of senescence and their bearing on a claimant's ability to undertake new work would inevitably produce the very unfairness and inconsistencies in disability cases that the guidelines were designed to eliminate. See 81-1983 Pet. Br. 28-37; *Fogg* v. *Schweiker*, *supra*, slip op. 10.

It may be that the lines drawn in the guidelines will not produce a perfect separation of claimants according to their physiological and mental traits produced by the aging process. But such a separation is neither possible nor necessary. The regulations specifically state that they are not to be applied "mechanically in a borderline situation." 20 C.F.R. 404.1563(a). Moreover, the regulations provide a method for taking account of impairments that usually accompany age, even when they afflict a younger person. For example, arthritis or premature senility would be considered apart from the tables in Appendix 2. If they should strike a 40-year old, he may be entitled to a determination

of disability made without exclusive reliance on the tables. See, e.g., 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(e).

When a regulation established by an agency is "judgmental or predictive," as is the case with the age classifications in the medical-vocational guidelines, "complete factual support in the record for the [agency's] judgment or prediction is not possible or required * * *." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-814 (1978). Fashioning a rule on the basis of expertise, in light of available if imperfect facts, is the traditional function of an administrative agency. "'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated * * *. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953).

3. The court of appeals' strained reading of the statutory requirement that the Secretary consider age in making disability determinations resulted from its inverted approach to the grant of rulemaking authority in the Act. Rather than ask what Congress had instructed the Secretary to accomplish through regulations, the court began by asking in general terms what kind of issues were proper subjects for rulemaking (App. A, *infra*, 8a-11a). The court stated that "because both the broad hearing provision and the broad rulemaking provision in the statute must be given their intended play, they should operate in areas where they are best suited" (*id.* at 10a). Since age "looks to the individual characteristics of the claimant," the court concluded that it was "clearly adjudicative" (*id.* at 11a) and hence a factor whose effects were properly determined in individualized hearings.

As the court recognized, however, the distinction between legislative and adjudicative facts is only "a principle to guide in the construction of th[e] statutory scheme" (App. A, *infra*, 8a). It should not be allowed to control the clear directions that Congress itself gave for the implemen-

tation of the Act. As the government's brief in *Campbell* emphasizes, Congress granted the Secretary broad and explicit authority to implement the disability provisions of the Act and expressed its hope that the resulting regulations would provide specific criteria to govern the effect that statutory factors such as age have on the evaluation of disability (81-1983 Pet. Br. 13-28).

The medical-vocational regulations do make the claimant's chronological age an adjudicative fact. In most cases it will be undisputed; but where it is a matter of uncertainty, age must be determined individually at an administrative hearing. 20 C.F.R. 404.1563(e); 20 C.F.R. Part 404, Subpart P, App. 2, Section 200.00(a). On the other hand, the weight given to a claimant's age in determining disability is a proper issue for rulemaking. The guidelines eliminate the unfairness of treating claimants of the same age differently on the basis of unmeasurable facts about senescence. They do so on the basis of factual judgments about the types of jobs open to individuals of given age (with different education, skills, and impairments), and policy judgments about the levels of restrictions that satisfy the definition of "disability" painted with a broad brush in the Act.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Schweiker* v. *Campbell*, *supra*, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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NOVEMBER 1982

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7140

JOHN BROZ, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, Secretary of Health & Human Services, a Department of the United States Government, DEFENDANT-APPELLANT.

No. 81-7143

RICHARD D. HOLMES, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, The Secretary of Health and Human Services, DEFENDANT-APPELLANT.

No. 81-7336

CORRINE LITTLE, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, Secretary of the Department of Health and Human Services, DEFENDANT-APPELLANT.

No. 81-7370

THOMAS O. JONES, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, Secretary, Department of Health and Human Services, DEFENDANT-APPELLANT.

No. 81-7466

FRED SOESBE, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, DEFENDANT-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

[Decided June 4, 1982]

Before GODBOLD, *Chief Judge*, HENDERSON and MERRITT*, *Circuit Judges*.

GODBOLD, *Chief Judge:*

In these five consolidated appeals we decide the validity of the Department of Health and Human Services' Medical-Vocational Guidelines, popularly known as the "grid regulations," which are employed in determinations of Social Se-

* Honorable Gilbert S. Merritt, U.S. Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

curity disability benefits.[1] These regulations appear at 20 C.F.R. part 404, subpart P, Appendix 2 (1981), and were promulgated in 1978 under the Federal Old-Age, Survivors, and Disability Insurance Benefits portion of the Social Security Act, 42 U.S.C. § 401 *et seq.*[2] In each of these cases disability benefits were denied on the basis of these grid regulations after a hearing conducted by an Administrative Law Judge. Each case was appealed to the Southern District of Alabama where a United States magistrate recommended that the grid regulations be held invalid and that the decision of the ALJ be reversed and remanded for reconsideration apart from the regulations. The district court adopted the magistrate's proposed findings and recommendations as its own findings of fact and conclusions of law. The Secretary of Health and Human Services appeals.

After a description of the grid regulations, we address first the question common to all of these cases, namely, the validity of the regulations, and then turn to alleged erroneous findings and procedures in the individual cases. We conclude that the regulations as they have been applied are invalid because they conclusively determine the effect of age on disability, but that they are capable of valid application by providing an individual determination of the age factor.

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[1] We are the fourth circuit to consider a broad challenge to the facial validity of the grid regulations. Three prior circuits have upheld the regulations under varying attacks. *Santise v. Schweiker*, F.2d (3d Cir. 1982); *Cummins v. Schweiker*, 670 F.2d 81 (7th Cir. 1981); *Kirk v. Secretary*, 667 F.2d 524 (6th Cir. 1981). *See* notes 5 & 9 *infra*.

The Second Circuit and the former Fifth Circuit have considered the validity of the regulations under a more limited attack. *Campbell v. Secretary*, 665 F.2d 48 (2d Cir. 1981) (remanding case for identification of specific jobs available to claimants); *Salinas v. Schweiker*, 662 F.2d 345 (5th Cir. 1981) (holding that existence of jobs in the economy is a proper subject for administrative notice). *See* notes 12 & 13, infra.

[2] 43 Fed. Reg. 55349 et seq. (1978), effective Feb. 26, 1979. The regulations were recently revised to simplify their language. 45 Fed. Reg. 55584 (1980). As no changes material to this discussion were made, citations are to the current version.

I. *The Act and the regulations*

The Act provides benefits to qualified individuals who are disabled. 42 U.S.C. § 423(a)(1). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any [permanent] medically determinable physical or mental impairment." *Id.* at § 423(d)(1)(A). Some impairments are per se disabling. 20 C.F.R. § 404.1525 (1981). For those not per se disabling a two-stage analysis is used to determine whether an impairment is disabling. A claimant must first show an impairment serious enough to prevent work in his or her previous job. Here the burden of proof is on the claimant. *Ferguson v. Schweiker*, 641 F.2d 243, 246 (5th Cir. 1981). If this burden is met the burden shifts to the Secretary to prove that the claimant "cannot, considering his age, education, and work experience, engage in any *other* kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A) (emphasis added).[3]

The Medical-Vocational Guidelines come into play at this second stage. Part of these regulations provide a general framework to guide the ALJ in his analysis of the medical and vocational facts that bear on his determination of whether a claimant is capable of performing other substantial gainful employment. 20 C.F.R. § 404.1545 -.1573 (1981). The part of the regulations at issue here, Appendix 2 to 20 C.F.R. part 404, subpart P, is no mere guideline, however, but is a detailed grid system directing a conclusion in certain cases on the issue of ability to perform other substantial work, based on the claimant's age, education, and work experience characteristics. These grid regulations are structured in this fashion: The ALJ first ascertains a

[3] "'Work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 423(d)(2)(A). It does not matter "whether such work exists in the immediate area in which [the applicant] lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." *Id.* Thus, the only issue is what jobs exist in the national economy that the applicant could perform, not whether he could actually obtain those jobs considering the labor market or employer hiring practices.

claimant's "residual functional capacity," which involves findings as to the claimant's ability to lift weight, sit, stand, push, and pull. 20 C.F.R. § 404.1567 (1981). For claimants found capable of sedentary, light, or medium work, the regulations provide three tables, one corresponding to each level of residual functional capacity. These tables account for the vocational factors of age, education, and work experience, which are mentioned in the statute. 42 U.S.C. § 423(d)(2)(A). The ALJ determines a claimant's age, education, and work experience and reads from the appropriate table and line the conclusion of whether the claimant is disabled.

When the grid regulations apply, they leave no discretion to the ALJ, for they direct the ultimate conclusion of whether a claimant is capable of other substantial gainful work in the national economy. Where the grids do not apply, however, the ALJ determines for himself, under the general guidelines accompanying the grids, whether the claimant is capable of other substantial work. 20 C.F.R. part 404, subpart P. App. 2 § 200.00(a), (d). The grid regulations do not apply unless each factor in the matrix is met by a characteristic of the claimant. *Id.* There are two notable exclusions from the grids. At a given residual functional capacity, if a claimant is capable of some work at that level but not a full range of work, then that level of the grids is not applicable. *Id.* at §§ 201.00(h), (i), 202.00(b); *see* 43 Fed. Reg. 9284, 9300. *Accord Santise v. Schweiker*, ___ F.2d ___, ___ slip op. p. 22, (3d Cir. 1982); *Kirk v. Secretary*, 667 F.2d 524, 529 (6th Cir. 1981). Second, in determining residual functional capacity only exertional limitations are considered, i.e., ability to lift, stand, push, pull, handle, etc. If a claimant has nonexertional impairments that significantly limit the ability to do basic work activities[4]—for example, sensory impairments such as skin or respiratory sensitivity and mental or emotional impairments—then the grid regulations do not apply. *Id.* at § 200.00(e).

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[4] This paraphrases the definition of "impairment" in 20 C.F.R. § 404.1520(c).

II. *Validity of the regulations*

A. Introduction

The effect of the Medical-Vocational Guidelines can be described in different ways. First, in directing a conclusion as to a claimant's ability to perform other substantial work, the essential effect of the Guidelines is to remove this ultimate issue from adjudication. Once a claimant's residual functional capacity, age, education, and work experience are known, the determination of whether the claimant is capable of substantial work in the national economy is made by the Secretary's regulations and not by the ALJ. Second, under the regulations, vocational expert testimony to support a conclusion of not disabled is unnecessary, and vocational expert testimony contradicting the conclusion is irrelevant. Thus, the regulations might be viewed as supplying the evidence necessary to discharge the agency's burden of proving by substantial evidence that a claimant no longer able to perform his previous work is capable of other substantial gainful activity. Third, the regulations might also be viewed as taking administrative notice of certain facts; that is, the regulations are based on the agency's observation that a substantial number of unskilled sedentary, light, and medium occupations exist in the national economy, and the agency's observation of the physical requirements for these jobs. *See* Appendix 2, *supra*, at §§ 201.00(a), 202.00(a), 203.00(a).

Correspondingly, in this case three lines of attack are made on the regulations: (1) They deprive a claimant of the right to an individual determination of disability by an ALJ at a hearing; (2) they improperly relieve the Secretary of the burden of demonstrating by substantial evidence that a claimant is capable of other substantial work; and (3) they fail to allow a claimant an opportunity to rebut the facts that are administratively noticed through the regulations.

B. The right to a hearing versus the authority to rulemake

(1) The statutory language

The Act confers the right to a hearing and to have an initial disability determination affirmed, reversed, or modified

on the basis of evidence adduced at the hearing. 42 U.S.C. § 405(b). The regulations have the effect of removing from ALJs, who conduct such hearings, the ultimate decision of the claimant's ability to perform other substantial gainful work and relegating to determination at the hearing only the subsidiary facts of residual functional capacity, age, education, and work experience. The regulations direct, for instance, that a 45-year old claimant capable of sedentary work with no transferable work skills and only limited education is not disabled. 20 C.F.R. part 404, subpart P, Appendix 2 § 201.18. This determination is conclusive and is made on the basis of facts noticed in the rulemaking where the regulations were promulgated. Claimants argue that the conclusiveness of this determination, made on the basis of facts not adduced at the hearing, violates 42 U.S.C. § 405(b).

On the other hand, the Secretary relies on the broad rulemaking powers under the Act to justify the regulations:

> The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions.

42 U.S.C. § 405(a). There are also more specific provisions directed toward the issue of disability:

> § 405(a):
> The Secretary ... shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.
>
> § 423(d)(5):
> An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

The problem we face, then, in the words of Professor Kenneth Culp Davis, is how "to fit together two statutory provisions, the one conferring the right to 'full hearing,' and the other conferring power to make substantive rules."

K. Davis, 2 *Administrative Law Treatise* § 12.16, at 467 (1979). The Secretary clearly has a degree of authority to promulgate substantive rules governing the determination of disability, yet any such rule necessarily removes some issues from adjudication that otherwise might have been subject to proof by a claimant at the hearing guaranteed by the Act.

(2) The principle of construction

The principle to guide the agency and the courts in harmonizing a claimant's statutory right to a hearing and the Secretary's substantive rulemaking powers is found in the well established distinction between legislative and adjudicative facts. Where only legislative facts are involved it is proper to rulemake; adjudicative facts, however, must be determined at a hearing. We emphasize that this distinction is employed here as a principle to guide in the construction of this statutory scheme and is not necessarily a matter of constitutional due process.

The legislative/adjudicative fact distinction, first articulated by Professor Davis in *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 404-07 (1942), has become a cornerstone of modern administrative law theory and has been widely accepted in the federal appellate courts. *See Association of National Advertisers Inc. v. FCC*, 627 F.2d 1151, 1162-63 & n.20 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (collecting cases from six circuits, including *Drummond v. Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200, 1210 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978)). *Accord*, K. Davis Treatise, *supra*, at § 15:2. Speaking broadly, adjudicative facts are those about the immediate parties, and legislative facts are all others. *Id.* at § 15:3, p. 143. "'Legislative facts ... apply universally, while adjudicative facts are those developed in a particular case.'" *U.S. v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981) (quoting *U.S. v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976)).

The legislative/adjudicative fact distinction is well suited to dovetailing the right to a hearing and the power to

rulemake because the distinction preserves the essential function of each process and assigns to each process the matters best dealt with by each: "'Trials are at their best when specific adjudicative facts are in dispute. Trials are seldom desirable either on legislative facts or on broad factual issues.'" *Drummond, supra*, 563 F.2d at 1210 (quoting K. Davis, *Administrative Law of the Seventies* § 7.00-11 at 276 (1976)). Instead, "determination [of legislative facts] is particularly appropriate to the administrative [rulemaking] process." *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). Trial procedure is best suited for adjudicative facts because the best source of information about specific facts concerning the individual parties is the parties themselves. Facts that concern scientific truths, sociological data, and industrywide practices, on the other hand, are not peculiarly within the knowledge of the parties and are not of the type that generally would be aided by viewing the demeanor of witnesses, by cross-examination, and other aspects of adversarial factual development. *See generally*, K. Davis Treatise, *supra*, at §§ 12:4, 15:3.

Construction of the Act in this fashion accords with scholarly opinion: "A statute [that] requires [a hearing on the record] can and should be interpreted ... not to require trial procedure on issues of broad legislative fact, because the purpose behind such a statute is always to require trial procedure on issues of adjudicative fact ..." *Id.* at § 14:13, p. 11. The Supreme Court has also recognized that a broad hearing requirement must give way in appropriate circumstances to rulemaking authority: "We do not read the hearing requirement ... as withdrawing from the [Secretary] the rulemaking authority necessary for the orderly conduct of business." *See U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (upholding FCC regulations that determine maximum number of broadcast licenses one individual can own in the public interest, despite right to a hearing when an application is denied).

Interpretation of the Act in terms of legislative and adjudicative facts is suggested in the Seventh Circuit's recent opinion upholding the validity of the grid regulations. That court observed that

> [i]f the statutory term "disability" described a historical [i.e., adjudicative] fact best or only ascertainable on a case-by-case basis, binding criteria might be a problem; but it does not. . . . A judgment [of disability], to be well informed, requires a broad knowledge of the labor market.

Cummins v. Schweiker, 670 F.2d 81, 83 (7th Cir. 1982). Other circuits that have reviewed the validity of the regulations have also emphasized the need for an individual determination of adjudicative facts. *Santise v. Schweiker*, ___ F.2d ___, ___ slip op. at 21 (3d Cir. 1982) ("the statute [demands that] the denial of disability benefits be the product of individualized fact finding, i.e., ... taking into account each applicant's peculiar characteristics"). *See Kirk v. Secretary*, 667 F.2d 524, 530 (6th Cir. 1981).[5] Finally, the prior caselaw deciding the validity of other disability regulations is consistent with this distinction. Regulations that attempt to determine conclusively that a particular impairment is not disabling have consistently been invalidated, *Marion v. Gardner*, 359 F.2d 175 (8th Cir. 1966) (regulation precluding personality disorders unless accompanied by severe psychosis); *Nickles v. Richardson*, 326 F. Supp. 777 (D.S.C. 1971) (regulation excluding diabetes unless it resulted in amputation); *Wooley v. Gardner*, 283 F. Supp. 576 (E.D. Pa. 1968) (regulation excluding hypertension unless accompanied by certain physiological effects), whereas regulations that define other aspects of the disability determination that are not focused on the individual characteristics of the applicant but instead address broader questions of economic and sociological fact have been upheld, *King v. Finch*, 313 F. Supp. 909, 914 (N.D. Ohio 1970) (regulation defining what level of compensation is "substantial"); *Levine v. Ribicoff*, 201 F. Supp. 692 (S.D.N.Y. 1962) (regulation defining what are "wages paid").

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[5] We cite these cases for their support of the legislative/adjudicative fact distinction. As seen below, we do not agree with the conclusion reached by the Seventh Circuit that the disability determination is entirely a matter of legislative fact, or with the conclusion of the Third and Sixth Circuits that the regulations leave for individual determination all of a claimant's individual characteristics. *see* note 9 *infra*.

To summarize our holding, because both the broad hearing provision and the broad rulemaking provision in the statute must be given their intended play, they should operate in areas where they are best suited. This is accomplished by restricting rulemaking to legislative facts and requiring determination of adjudicative facts in a hearing. The distinction between the two sets of facts is not a bright line one, *see* K. Davis Treatise, *supra*, at §§ 12:3, 15:3, and so the Secretary should be given discretion in construing the Act in borderline situations.[6] Therefore, the regulations are valid if they refrain from determining what are fairly classified as adjudicative facts.

(3) Application of the legislative/adjudicative fact distinction

We now review the regulations to determine if they confine themselves to nonadjudicative facts. As discussed above, the regulations come into play at that stage of the disability determination where the issue is whether the claimant can perform substantial gainful employment other than his former job. There are two elements in this determination. First, it is necessary to decide what capabilities and qualifications the claimant has, namely, residual functional capacity, age, experience, and education. Second, it is necessary to determine whether there are a substantial number of jobs in the national economy that a person with these characteristics can perform. Generally speaking, the first element is a matter of adjudicative fact; the second is not. The first looks to the individual characteristics of the claimant. This is clearly adjudicative. The second element looks to conditions of the national job market. It is concerned with broad sociological data that is not related to the individual parties. It therefore concerns nonadjudicative matters.

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[6] *Cf. Sullivan v. Weinberger*, 493 F.2d 855, 859 (5th Cir. 1974): "Congress delegated to the Secretary the responsibility for prescribing regulations concerning the determination of what showing is sufficient to prove that the claimant's alleged impairment is a disability under the Act. . . . This is an area where administrative expertise should be accorded great weight."

For the most part the regulations are consistent with this outline. They leave for case-by-case determination the critical factor, which is the physical capability of the claimant. If the claimant is found to have the exertional capacity to perform sedentary work, for instance, and has no nonexertional impairments, then the grids are consulted for the disability determination. In the majority of cases the claimant is found not disabled regardless of his education and experience because the grids determine that there are a substantial number of unskilled jobs in the national economy. Where it is necessary to evaluate a claimant's ability to perform skilled work, and education and experience thus become critical to the disability determination, these two factors are open to individual adjudication in terms of the claimant's specific skills. A claimant's education is evaluated in terms of the degree to which it has conferred job skills. 20 C.F.R. § 404.1564 (1981); *see* note 8 *infra*. Work experience is likewise evaluated in terms of the specific skills learned and the extent to which these skills are transferable to other jobs. *Id.* at § 404.1565. Thus, for the three factors of residual functional capacity, education, and work experience, the regulations "are premised on the necessity to adjudicate each case individually to determine what work a specific individual is able to do." The regulations remove from adjudication only "the kinds and numbers of jobs that exist in the national economy and their skill and exertional requirements." 43 Fed. Reg. 55349, 55352 (1978). In large part, then, the regulations properly allocate legislative and adjudicative facts between rulemaking and the hearing.

The final factor is age. Age is relevant under the grid regulations in this manner: The grids operate with the premise that, at a certain point, age significantly restricts a worker's ability to adapt and adjust to a new job and a new working environment. *Id.* at § 404.1563(a).[7] For instance,

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[7] " 'Age' refers to how old you are . . . and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition with others."

We do not hold that this is the only interpretation that may be given to the age factor. The agency interprets it this way and no one chal-

the sedentary grid determines that a 50-year old claimant with no skills and limited education is disabled, while a 49-year old claimant with the same characteristics is not disabled. *Compare* 20 C.F.R. part 404, subpart P, Appendix 2 § 201.09 *with id.* at § 201.18. *See, e.g., Cummins v. Schweiker*, 670 F.2d 81, 83 (7th Cir. 1982).

This adaptability or adjustment factor is not open to individual determination under the grids. Instead the grids conclusively determine that a person 49 years of age is able to adjust to a new unskilled sedentary occupation but that a person 50 years old is not.[8] In this respect the Secretary has exceeded the authority conferred by the statute because the regulations determine an adjudicative fact.[9] As the Secretary treats this factor, a person's ability to adapt or adjust is clearly a fact relating to the individual claimant and not one relating to the national labor market:

> Where age is critical to a decision, recognition is taken of increasing physiological deterioration of the senses, joints, eye-hand coordination, reflexes, thinking proc-

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lenges it, so we proceed under this interpretation. We must confess some confusion concerning this adaptability factor, though. The agency considers that the inability to adapt to a new work environment can be offset or mitigated by job skills or education. But one would think that a person unable to adjust to an unskilled job could also not adjust to a skilled job.

[8] Contrast the treatment given the age categories with that given the education categories:

> Adjudicative weight is ascribed to formal education only to the extent that such education contributes to the individual's ability to meet the vocational requirements of jobs; e.g., reasoning ability, communications skills or language competence, arithmetical ability ... Thus the judgment must be an individualized one and pertain to the facts presented about the claimant being evaluated. Grade level is only determinative in the absence of evidence to the contrary.

43 Fed. Reg. 9284, 9299 (1978).

[9] This is the juncture where we depart from the opinions of other circuits. The Third Circuit has held that the regulations require "complete consideration of all of an applicant's relevant characteristics." *Santise*, ____ F.2d at ____, slip op. p.21. The Seventh Circuit evidently views the disability determination to consist entirely of legislative facts. *See* note 5 *supra* and accompanying text. The Sixth Circuit has held that the "grid requires that a claimant's particular characteristics be evaluated before a disability determination is reached." *Kirk*, 667 F.2d at 530.

> esses, etc., which diminish a severely impaired person's aptitude for new learning and adaptation to new jobs.

43 Fed. Reg. 55349, 55359 (1978).[10]

The Secretary proffers this justification for the mechanical treatment given the age-adaptability factor in the grid regulations:

> [T]here are no conclusive data which relate varying specific chronological ages to specific physiologically-based vocational limitations for performing jobs; this was a pioneering effort by SSA due to the unique nature of its disability program.

Id. at 55359.[11] The lack of precision in the adaptability factor does not, however, justify a legislative approach to its resolution. Instead, the very fact that there are no scientific data sources on which to make the conclusions that the regulations draw underscores that the best source of information for determining the effect of age on adaptability is the individual claimant.

To recapitulate, the Secretary has interpreted the Act to require a consideration of the effect of age on the ability to adapt to a new job. This is decidedly an adjudicative factor and therefore must be given individual consideration through adjudication rather than legislative resolution

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[10] Indeed, where the grid regulations are not applicable and disability is determined on the basis of the general guidelines in 20 C.F.R. § 404.1525 et seq., the Secretary has recognized the need for a more case-by-case determination than is made in the grids: "[W]e will not apply these age categories mechanically in a borderline situation." Accord 43 Fed. Reg. 55349, 55354 (1978) ("the point when age could be expected to be an adverse consideration in determining an individual's vocational adaptability to [new] work . . . is an expectancy only and not an arbitrary limit").

[11] *See also*, Goldhammer, *The Effect of the New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims*, 32 Admin. L. Rev. 501, 508 (1980):

> Now, this question of adaptability of older workers to new jobs was raised from time to time at hearings taking place before the new vocational regulations took effect. The typical response of vocational expert witnesses was that while older workers are generally less adaptable to change than younger workers, it is virtually impossible to apply that generalization to specific situations.

through rulemaking. Because the ALJ applied the grid regulations in these cases to determine conclusively these claimants' abilities to adapt to new work, the cases must be remanded for an individual consideration of this factor. *See* 42 U.S.C. § 405 (g) (providing for remand to the agency upon showing of good cause); *Ferguson v. Schweiker*, 641 F.2d 243, 246 n.3, 250 n.8 (5th Cir. 1981) (same).

We do not decide at this stage how individual consideration of the age-adjustment factor must be accomplished. We observe, however, that two mechanisms exist under the regulations as written that would meet the requirements of the Act. As discussed above, the grid regulations do not apply if a claimant is unable to perform a full range of work at a given residual functional capacity. For instance, although manual dexterity is not a listed criterion for determining that a claimant is capable of sedentary work, if an applicant's dexterity is restricted to the extent that he cannot perform a full range of sedentary work, then the sedentary grid does not apply and the case is decided under general guidelines. 20 C.F.R. part 404, subpart P, Appendix 2 § 200.01(h). An applicant's inability to adapt to new work environments might also limit his ability to perform a full range of work. Second, if an applicant has a nonexertional impairment that significantly limits basic work skills, then the grids are inapplicable. The Secretary intends the category of nonexertional impairments to be flexible: "This particular area does not lend itself to a great degree of specificity." 43 Fed. Reg., *supra*, at 55359. Therefore, we perceive no reason why the age factor could not be evaluated as a nonexertional impairment as well. If the effect of age on the ability to adapt is considered through either of these two routes—full range of work or nonexertional impairment—then the individual determination that is required of this adjudicative factor is supplied despite the apparent flaw in the regulations. We emphasize these two mechanisms because they presently exist in the regulations and therefore enable us to uphold the regulations as written if applied in this fashion. We do not intend to hold that this is the only manner in which the age-

adjustment factor may be dealt with by the agency. *Cf.*, *e.g.*, note 8 *supra*.

C. Substantial evidence and administrative notice

Having determined that the regulations if properly applied are within the Secretary's rulemaking powers conferred by the Act and do not contravene claimants' rights to a hearing, we turn to the contentions that the regulations cannot serve as substantial evidence to discharge the Secretary's burden of proving a claimant is capable of other substantial gainful activity, and that the regulations improperly take administrative notice of facts without an opportunity to rebut.

(1) Substantial evidence

In *Salinas v. Schweiker*, 662 F.2d 345, 347-49 (5th Cir. 1981), the former Fifth Circuit held that the administrative notice taken in the grid regulations of the existence of substantial work in the national economy for which a person with a claimant's characteristics is qualified is substantial evidence and may be used in lieu of vocational expert testimony. We are bound by this holding. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).[12]

We also find claimants' argument unconvincing under an alternative analysis. The flaw in the contention that the regulations cannot discharge the agency's evidentiary burden at the hearing is that the regulations are not a source of evidence for the ALJ's determination of disability but quite differently create a rule of agency law directing the

[12] The Second Circuit differs with this result, holding that the regulations fail to provide notice of particular jobs that a claimant is capable of performing. *Campbell v. Secretary*, 665 F.2d 48, 53–54 (2d Cir. 1981). This requirement of identification of specific jobs does not hold in this circuit, however, where the claimant has first been found capable of a full range of work in a given residual functional capacity. *Ferguson v. Schweiker*, 641 F.2d 243, 247–48 (5th Cir. 1981). Moreover, as discussed immediately following in text, we do not agree with the implicit premise of the Second Circuit that the Secretary's regulations must comply with the caselaw prescribing the Secretary's evidentiary burden at an adjudication.

ALJ's ultimate conclusion. The proper characterization of the regulations undermines claimants' contention in two ways. First, the regulations remove from adjudication the ultimate issue of ability to perform new work. Therefore, they do not purport to be, and need not be, a source of evidence on this matter, because the matter is not subject to adjudication. The only issue then is whether it is within the Secretary's power to remove this issue from adjudication, and that question has been answered above in the affirmative. Second, where the Secretary exercises rulemaking authority, the standard of review is no longer one of substantial evidence but instead whether the regulations are valid and properly applied.

> The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied ... because of failure of the claimant ... to submit proof in conformity with any regulation ..., *the court shall review only the question of conformity with such regulations and the validity of such regulations.*

42 U.S.C. § 405(g).

For those subsidiary factual issues that do remain for adjudication—residual functional capacity, age, education, and work experience—the regulations do not alter the burden of proof or the evidentiary standard. *Watkins v. Schweiker*, 667 F.2d 954, 955 (11th Cir. 1982).

(2) Administrative notice

The Administrative Procedure Act requires that when "an agency's decision rests on official notice of a material fact ..., a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. § 556(e). Claimants reason that the regulations contravene this provision because they take administrative notice of the existence of a substantial number of unskilled jobs in the national economy and the requirements for those jobs, without affording an opportunity to rebut.[13] If this characterization of the

[13] This issue is not controlled by *Salinas v. Schweiker*, 662 F.2d 345 (5th Cir. 1981). There the court held that it was proper to take administrative notice of the existence in the economy of jobs that a person

regulations is followed, claimants have an easy case indeed, for the notice taken in the regulations is in fact conclusive. This is surely too facile, however. Section 556(e) applies only to adjudications, not to rulemakings.[14] Administrative notice of the existence of unskilled jobs and their requirements was not taken in any of these claimants' cases but was taken at the rulemaking where these regulations were promulgated.

Claimants' argument is strengthened by contending that when the regulations, which are based on administrative notice, are applied in an adjudicatory context to direct the ALJ's ultimate determination, then the "agency's decision rests on official notice." We find this not convincing. It is merely a convenient manner of expressing the effect of the regulations to say that they direct the ALJ's determination.[15] It is more precise and accurate, however, to observe that when the regulations are applied the ALJ does not determine disability. The ultimate issue is removed from adjudication. Only the subsidiary facts upon which the regulation operates are decided or determined through the adjudicatory process. Therefore, the determinations actually made at the hearing are not based on administrative notice, and § 556(e) is thus not applicable.

To illustrate the fallacy of claimants' argument, we observe that it could be made against any regulation that is applied in an adjudicatory context, for every rulemaking is based on notice of legislative facts that inform the rule that

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with the claimant's qualifications can perform and that vocational expert testimony is not necessary once the claimant's individual vocational characteristics have been considered. This issue of the use of administrative notice instead of vocational testimony differs from the administrative notice issue we face in that in *Salinas* the issue was a substantive one of whether jobs in the economy is a proper subject for administrative notice whereas here the primary issue is a procedural one of, assuming it is proper to take judicial notice, was proper notification and opportunity to rebut afforded.

[14] Appellees do not contend that the rulemaking in which the regulations were adopted was deficient in failing to provide an opportunity to respond.

[15] *See, e.g., Salinas v. Schweiker*, 662 F.2d 345, 347–49 (5th Cir. 1981).

is promulgated. For instance, the Act expressly empowers the Secretary to define by rule "when . . . earnings . . . demonstrate an individual's ability to engage in substantial gainful activity," 42 U.S.C. § 423 (d)(4), and accordingly regulations provide that earnings over $300 per month ordinarily show substantial gainful activity, 20 C.F.R. § 404.1475(b)(2)(vi). Such regulations are based in part on administrative notice of the prevalent wage rates. Under the profferred interpretation of § 556(e), if an ALJ invoked this rule to deny benefits the regulation would be invalid despite the Secretary's clear power under the Act. To state this proposition is enough to demonstrate that this is not the fashion in which § 556(e) is meant to apply. Instead, if the Secretary is empowered by the Act to remove an issue from litigation by determining it conclusively in rulemaking, § 556(e) is inapplicable because the administrative notice taken is not taken during adjudication.

III. *The individual cases*

We have held that all of these cases must be remanded to the agency for an individual consideration of the age-adjustment factor because the regulations as heretofore applied conclusively determine this adjudicative matter. We decide now whether there were other defects in the particular cases, aside from the validity of the regulations, that require reconsideration on remand. There are two matters to address. First, some claimants contend that application of the regulations to them was not predicated upon proper findings by the ALJ. Second, claimants contend that decision of their cases under the regulations was procedurally unfair because there was no notice of the ALJ's intention to rely on the grids, and therefore there was no proper opportunity to offer rebuttal evidence showing that the claimant cannot perform a full range of work.

A. Predicate findings

Claimant Holmes, age 32 at the time of the agency hearing, suffered a back injury in 1976 that precluded him from continuing his former work at a paper mill. After his second

application for disability benefits Holmes was adjudged disabled for a time but was determined in 1977 to have regained the ability to perform substantial gainful employment. This determination was made on the basis of a physician's report that, after treatment, there was no reason Holmes could not resume some substantial work. No appeal was taken from this determination. Subsequently, Holmes was twice hospitalized and was seen by several other doctors because of back problems. He continues to suffer pain, he complains of vision problems and numbness, he undergoes four hours of traction per day, and he takes three drugs that potentially affect his mental acuteness.

In the hearing held in this third application for benefits, the ALJ found, based on the 1977 doctor's report saying that Holmes could return to work and the adjudication the same year that he was not disabled, that Holmes was capable of sedentary work. His age, experience (unskilled), and education (illiterate)[16] resulted in a not disabled determination under the grids. 20 C.F.R. part 404, subpart P, App. 2 § 201.23.

The district court reversed and remanded, holding that the need for four hours of traction and the mental effects of the medication were nonexertional impairments, and therefore Holmes' case falls outside of the grid. We cannot agree fully. Although it is clear from the record that these matters potentially impose limitations on Holmes' ability to perform sedentary work, we cannot say with certainty that they rise to the level of nonexertional impairments or prevent a full range of sedentary work. No findings were made on these matters by the ALJ, so Holmes' case must be remanded. *See Harrell v. Harris*, 610 F. 2d 355 (5th Cir. 1980) (finding inadequate consideration by ALJ of need for therapy and the effects of medication). Because there is no evidence or findings on how these potential limitations in

[16] Mr. Holmes was not actually adjudged illiterate but only presumed so by the ALJ because he claimed only a limited ability to read and write and it was not necessary under the grids to determine whether he was literate.

fact limit Holmes' work skills, however, we do not hold that the ALJ must decide the case outside the grid system; instead, the question of whether the grids apply must be reconsidered. *See Ferguson v. Schweiker*, 641 F.2d 243, 250 n.8 (5th Cir. 1981) (case should be remanded for agency consideration where record does not support "a dispositive ruling").

Holmes also complains that inadequate attention was given by the ALJ to his allegations of pain and to his post-1977 hospitalizations and physicians' reports. Although we need not decide whether these defects alone would warrant reconsideration of the case, we agree that the ALJ's treatment of these matters was abbreviated, and, inasmuch as this case must be substantially reconsidered on other grounds, on remand the ALJ should make a fresh determination of the extent of Holmes' current impairments and whether he meets the exertional requirements for sedentary work.

Claimant Jones, a former telephone installer and line repairman with a tenth grade education, age 52 at the time of his hearing, was found capable of light work and thus not disabled under § 202.11 of the grid regulations. Jones complains of back problems that cause pain and of a sinus condition and arthritis. He challenges the finding by the ALJ that he is capable of light work.

Jones' personal physician reported that Jones is totally disabled. Recent examinations by two other physicians, however, report that despite Jones' difficulties he is capable of light work as defined in the regulations. The ALJ was allowed to resolve this conflict in the medical evidence. Jones also contends that the ALJ did not consider his allegations of pain. Examination of the record discloses that pain was considered but discounted in the light of physicians' examinations. In particular, the fact that Jones' "responses on physical examination were very much anticipatory and somewhat exaggerated," in the words of the ALJ, supports the ALJ's decision to discount Jones' allegations of pain.

Claimants Soesbe, Broz, and Little have not challenged in their briefs to this court or to the district court any of the agency's findings on matters predicate to application of the grid regulations.[17]

B. Procedure

Claimants contend that, if the regulations are valid, they should be given notice that their cases will be determined under the regulations so that they may develop the facts necessary to rebut application. We perceive no need for special notice of these regulations. The regulations, as published in the Code of Federal Regulations, fully explain the requirements for their application and that a disability case will be decided under them where appropriate. They require no more notice than other regulations governing the disability determination.

We emphasize though that there is a "basic obligation" on the ALJ in these nonadversarial proceedings to develop a full and fair record, which obligation rises to a "'special duty ... to scrupulously and conscientiously explore for all the relevant facts'" where an unrepresented claimant has not waived counsel. This duty of inquiry on the ALJ would include, in a case decided under the grids, a duty to inquire into possible nonexertional impairments and into exertional limitations that prevent a full range of work. Claimants Holmes' and Jones' contentions concerning the ALJ's consideration of their cases have been addressed, and no other claimant contends that the ALJ's consideration was not full and fair.

The judgments of the district court are AFFIRMED in part and VACATED in part, and these cases are REMANDED with instructions to remand to the agency for further proceedings not inconsistent with this opinion.

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[17] Claimants Soesbe and Broz did allege at oral argument that it was not proper to apply the regulations in their cases. This is too late in the long history of these cases to raise these contentions. *See Nathan Rodgers Construction Co. v. City of Saraland*, ___ F.2d ___ (5th Cir. 1982) (on petition for rehearing).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 80-0156-H

JOHN BROZ, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS,
SECRETARY OF DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER AND JUDGMENT

After due and proper consideration,[1] and upon the recommendation of the Magistrate, which is adopted as the opinion of this Court, it is ORDERED, ADJUDGED and DECREED that the Administrative decision be and is hereby VACATED, and that this cause be REMANDED to the Secretary of Health and Human Resources for additional proceedings not inconsistent with the opinion of this Court, no costs to be taxed.

DONE this 11th day of December, 1980.

/s/W. B. HAND
United States District Judge

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
11th Day of Dec., 1980,
Minute Entry
No. 52,107
WILLIAM J. O'CONNOR,
Clerk
By G. WALTER
Deputy Clerk

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[1] *To the cases cited by the Magistrate, the Court adds Fruge v. Harris, No. 803476 (5th Cir., Dec. 4, 1980).*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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JOHN BROZ, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

RECOMMENDATION OF MAGISTRATE

Plaintiff filed a suit in this Court as provided by 42 U.S.C. § 405(g) for review of an adverse decision of the Administrative Law Judge ["ALJ"] on a Social Security Disability claim. The Court referred this matter to the Magistrate for preliminary review of the administrative record[1] and recommendation.

Congress provided that in such a case the Court shall have power under 42 U.S.C. § 405(g) to enter judgment upon the pleadings and transcript, or to remand the case. The Magistrate recommends that this cause be remanded to allow the Secretary to offer rebuttal evidence in accordance with applicable law.

I. *Procedural History.* On August 22, 1977, plaintiff filed a claim with the Social Security Administration seeking an entitlement to a "period of disability" under 42 U.S.C. § 416(i), and Social Security Disability Insurance benefits as provided by 42 U.S.C. § 423. The plaintiff claimed disability because of a bad leg, a "drop foot," a ruptured disc, and damage to his spinal cord. The Social Security Administration determined that the plaintiff was disabled as of July, 1977, because of his back condition. In a later continuing disability investigation the Secretary determined that the plaintiff's disability ceased in March, 1979, because of medical improvement. The cessation determination was affirmed on reconsideration.

[1] 28 U.S.C. § 636(b)(3); *Mathews* v. *Weber*, 423 U.S. 261 (1976).

The ALJ held a twenty-two minute hearing on October 16, 1979, at which the plaintiff was not represented by an attorney. The ALJ affirmed the cessation decision, finding is substance that:

1. Claimant ceased to meet the criteria for disability benefits in March, 1979, and claimant compiled with all jurisdictional conditions in his appeal from the cessation determination;

2. Claimant was born on January 4, 1947, and was defined as a "younger individual";

3. Claimant had a high school education;

4. Claimant had prior substantial gainful activity as a commercial painter;

5. Medical evidence revealed that claimant underwent a bilateral cervical laminectomy with good postoperative recovery and as of March, 1979, had no definite weakness or atrophy in the upper extremities and had good return of function. Claimant had suffered an injury to his right peroneal nerve but had not suffered such significant loss of function as to be precluded from engaging in all substantial gainful activity;

6. Social Security medical-vocational guidelines regulations required that claimant as of March, 1979, considering his maximum sustained work capacity, age, education, and work experience, be found "not disabled";

7. Claimant was not under a disability as of March, 1979, and continuing thereafter.

The Appeals Council refused the request to review the decision of the ALJ and plaintiff thereupon sought review in this Court of the decision of the ALJ, the final administrative decision.

II. *Evidence of Record.*

A. *Employment Background.* Plaintiff is a 33 year-old male with a twelth-grade education. He lives with his wife and two children in a house he owns. He received his last Social Security check in May, 1979, and at the time of the hearing, he had no income. His wife has a part-time job.

The plaintiff last worked as a painting contractor prior to his surgery in 1977. He has also worked as a painter's helper and a painter beginning in 1965.[2]

B. *Alleged Medical Problems.* Plaintiff claims that his condition has not improved, but has instead gotten worse. Plaintiff says that his neck hurts, his arms are numb, and his nerves are "about shot."[3] Plaintiff claims he is in constant pain which begins in his shoulders and goes into his arms and legs.[4]

C. *Medical Testimony.* The medical records reveal that the plaintiff suffered an injury to the peroneal nerve (outer side of the leg) of his right *leg* in 1958, which resulted in a foot drop.[5]

Plaintiff also suffered a *neck* injury in 1973, when diving into a swimming pool and hitting the top of his head on the bottom of the pool. Eight months after the accident, plaintiff developed weakness in his right hand for which he was hospitalized and treated with cervical traction by Dr. M. H. Taylor, a general surgeon in Foley, Alabama.

The next medical records refer to July 27, 1977, when the plaintiff was admitted to the Baptist Hospital in Pensacola, Florida by Dr. F. D. Kimbell, a neurosurgeon, with a diagnosis of cervical disc injury. Plaintiff was complaining of neck pain and right shoulder and arm pain which had been severe for several weeks and was gradually becoming more disabling.

Dr. Kimbell performed a myelogram on the plaintiff on July 28, 1977, which showed a defect at cervical 5 and 6 discs and the next day the doctor performed a bilateral cervical laminectomy (excision of the posterior arch of a vertebra) of cervical 4, 5, and 6 discs. Plaintiff was discharged on August 5, 1977, at which time he was ambulatory with no further arm discomfort and a minimal amount of neck

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[2] Record at 28-30, 55, 65.
[3] *Id.* at 115.
[4] *Id.* at 110.
[5] *Id.* at 71-78.

discomfort. Dr. Kimbell's discharge diagnosis was herniated cervical 5 disc with spinal cord compression which was treated and improved.[6]

Dr. H. C. George, orthopedic surgeon in Fairhope, Alabama, examined the plaintiff on November 5, 1977. In a letter to the Disability Determination Unit, Dr. George recounted the plaintiff's medical history, concluding that some three months after the operation he was not doing well. Plaintiff had pain concentrated in his neck, and low back pain which was probably secondary to the neck pain. He told Dr. George that any physical exertion caused an intense increase in the pain. The doctor's prognosis was that he could expect some slow continual improvement but less than complete recovery.[7]

On November 18, 1977, Dr. Kimbell saw the plaintiff, who had complaints of a shocking sensation in both arms and down his spine into his legs. Dr. Kimbell told the plaintiff that as the muscles in the surgical incision of his neck grew stronger, the shocking sensations shou'[illegible] gradually improve. The doctor suggested that the plainti[illegible]ould have another myelogram but the plaintiff said he was unable to afford the hospitalization.[8]

In January, 1978, plaintiff received notice of a favorable decision entitling him to disability benefits. Then, in February, 1979, he received notice that his disability status was scheduled for review.

The medical evidence introduced at the time of the review included the results of an examination of the plaintiff done at the request of the Social Security Administration by Dr. William Bridges, a neurosurgeon in Mobile. On March 20, 1979, Dr. Bridges wrote to the Disability Determination Unit that the plaintiff was continuing to have neck pain, right arm pain, and right arm numbness and weakness. It was the doctor's opinion that the plaintiff would benefit from a foot drop brace on his right foot and if his neck and arm pain increased he should have a myelogram. Dr. Bridges felt that the plaintiff had 8% permanent partial

[6] *Id.* at 79-82.
[7] *Id.* at 92-3.
[8] *Id.* at 98.

disability because of his right foot drop, and a 3-4% permanent partial disability because of his neck injury. Dr. Bridges felt that the plaintiff was employable.[9]

Included in the new medical evidence was an insurance form filled out by Dr. Taylor on August 3, 1979, in which he indicated that the plaintiff would never be able to work because of persistent pain and weakness from a cervical disc.[10]

The last of the medical evidence consists of notes from Dr. Taylor. There are several notes on prescription pad paper written in October, 1979, stating that the plaintiff is totally disabled.[11] There is also a letter written on November 15, 1979, in which Dr. Taylor states the plaintiff has cervical radiculitis (inflammation of the root of a spinal nerve) which causes persistent pain and that his functional limitation has caused pain which is precipitated by any strain.[12]

D. *Plaintiff's Testimony.* Plaintiff testified that his daily activities consist of trying to fish a little and trying to help his wife out around the house. He can do a little but then starts hurting so bad that he has to lie down. He is able to drive sometimes but has to wear a cervical collar when driving or riding in a car. He has a cane to use when his leg is weak and he is on medication for pain.[13]

Plaintiff objected to the medical report by Dr. Bridges because during the examination the doctor appeared to him to be in a hurry. According to the plaintiff, the doctor "poked around a little bit," ran a needle up and down his right arm, twisted his neck, and had him walk across the floor and balance on one foot at a time.[14]

E. *Witnesses' Testimony.*

1. James Troy King, a painting contractor and a friend of the plaintiff's for approximately 14 years, testified that he visits with the plaintiff two or three times a week and that on each visit since his operation, plaintiff has been in pain.

[9] *Id.* at 127-8.
[10] *Id.* at 131-2.
[11] *Id.* at 133-4.
[12] *Id.* at 137.
[13] *Id.* at 30, 32-33.
[14] *Id.* at 34.

Mr. King stated that he and the plaintiff have tried to go fishing and that the plaintiff is in such pain that he cannot even go fishing for 30 minutes.[15]

2. Mrs. Mary C. Broz, the plaintiff's wife, testified that in her opinion, her husband is totally disabled. She testified that he tries to do things around the house but he cannot; that he is short tempered; that he cannot do things with the children that a father is supposed to do; and that he is losing weight because of bad nerves. In her opinion, her husband is not able to work.[16]

III. *Applicable Law in General.* The Social Security Act:

> sets forth a two-part test for determining "disability" under the Act: First, there must be a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months . . . ." 42 U.S.C. § 1382c(a)(3)(A). Second, this impairment must be so severe that the claimant is "not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." *Id.* § 1382c(a)(3)(B).[17]

If plaintiff shows that he or she cannot now perform his former job, the burden shifts to the Secretary to show both that the claimant is able to perform other work, and that such other work is in effect available in the economy.[18] The availability of work is normally proven either by the

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[15] *Id.* at 35-37.

[16] *Id.* at 38-39.

[17] *Chaney* v. *Califano*, 588 F.2d 958, 959 (5th Cir. 1979).

[18] *McGill* v. *Harris*, 615 F.2d 365 (5th Cir. 1980); *Johnson* v. *Harris*, 612 F.2d 933 (5th Cir. 1980); *White* v. *Harris*, 605 F.2d 867, 869 (5th Cir. 1979); *Knott* v. *Califano*, 559 F.zd 279, 280 (5th Cir. 1977).

testimony of a vocational expert[19] or by administrative notice[20] if properly taken.[21]

IV. *Standard of Review.* Congress has clearly provided that in a Social Security case the administrative findings "as to any fact, if supported by substantial evidence, shall be conclusive...."[22] This Court's function is strictly limited; we may only determine whether the administrative findings are supported by "substantial evidence" considering the record as a whole.[23]

The term "substantial evidence" in this circumstance means:

> more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[24]

The testimony is undoubtedly quite strict. Though it may be "so stringent that it has been described as bordering on the unrealistic,"[25] it is nevertheless true that "the claimant's burden of proof is not insuperable."[26]

V. *Medical-Vocational Guidelines* ["*The Grid*"]. The resolution of this case is inextricably interwoven with the applicability and validity of the new "Medical-Vocational Guidelines"[27] or, more commonly, "the grid" and its attendant explanatory regulations. While plaintiff did not in his complaint specifically challenge the use of the grid, he did allege that the findings of the ALJ were not supported by substantial evidence. Since the conclusion of the ALJ is apparently based solely upon the grid, the decision of the ALJ

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[19] *E.g.*, *Chaney* v. *Califano*, 588 F.2d 958, 960 (5th Cir. 1979).

[20] *Brown* v. *Finch*, 429 F.2d 80, 82 (5th Cir. 1970); *Breaux* v. *Finch*, 421 F.2d 687, 689 (5th Cir. 1970).

[21] *White* v. *Harris*, 605 F.2d 867, 870 (5th Cir. 1979).

[22] 42 U.S.C. § 405(g).

[23] *Chaney* v. *Califano*, 558 F.2d 958, 959 (5th Cir. 1979); *Mims* v. *Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978); *Rivas* v. *Weinberger*, 576 F.2d 255, (5th Cir. 1973).

[24] *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co.* v. *N.L.R.B.*, 350 U.S. 197, 229 (1938).

[25] *Johnson* v. *Harris*, 612 F.2d 993 (5th Cir. 1980), *quoting Williams* v. *Finch*, 440 F.2d 613, 615 (5th Cir. 1971).

[26] *Simmons* v. *Harris*, 602 F.2d 1233, 1236 (5th Cir. 1979), *quoting Mims* v. *Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978).

[27] 20 C.F.R. § 404.1513 Subpart P. App. 2, § 200.00 *et. seq.*

is supported by substantial evidence only if the grid establishes a system of adjudication not at variance with the statutes, Constitution, or decisional laws of the United States.

A. *The Medical-Vocational Guidelines* ["*The Grid*"]. In the middle 1970's the Social Security Administration began[28] an internal study of the possibility of adoption of regulations providing increased use of administrative presumptions and administrative notice, having a view toward both administrative efficiency and nationwide uniformity in Social Security Disability determinations. The new regulations became effective on February 26, 1979.[29] Because parts are displayable as a simple chart or table, the Medical-Vocational Guidelines are commonly called "the grid" a usage which, though technically limited to the tables themselves, commonly includes the attendant explanatory matter.

1. *The Grid in Perspective: Pre-Grid Analysis.* There is a sequential analysis by which the agency determination reaches the level at which the grid is used, the entire process moving toward a determination of whether or not an applicant is "disabled" within the meaning of 42 U.S.C. § 1382c(3). Several preliminary steps are involved.

The several steps are, in sum, these:

First, the agency determines whether the person is actually working.[30] If so, the agency conclusively presumes that the applicant is not disabled and the claim must be denied;[31] but if not, the agency moves to the second step.

Second, the agency must determine whether the claimed impairment is "severe."[32] If not, the claim is denied on

[28] The work was apparently at the prodding of certain congressional committees and the General Accounting Office. Since no statute was passed, however, the work should be treated as a pure executive branch effort.

[29] The hearing in this case occurred six months later.

[30] 20 C.F.R. § 404.1503(b).

[31] By comparison, judge-made law in other areas recognizes that a person, though injured, is often "required to work in order to survive." *Vaughn* v. *Atkinson*, 369 U.S. 527, 533 (1962) (maintenance and cure under the general maritime law).

[32] 20 C.F.R. § 404.153(c).

medical evidence alone; but if so, the agency moves to the third step.

Third, the agency determines whether the applicant's impairment equals or exceeds in severity a list of impairments.[33] If so, the applicant is entitled to benefits, but if not, the agency goes to the fourth step.

Fourth, the agency determines whether the applicant is able to perform his or her past work. If so, the agency finds that the applicant is not disabled under the law,[34] but if not, the agency moves to the fifth step. At this point the burden shifts to the Secretary.[35]

Fifth, and last, the agency must determine whether the applicant is able—despite his or her inability to perform his or her prior work—to perform other substantial gainful activity considering his or her age, education, and work experience.[36] It must be continually recalled that by this point the burden has already shifted to the Secretary to rebut plaintiff's *prima facie* case. The *grid system* is designed to constitute the Secretary's rebuttal to the claimant's *prima facie* case, and the entire rebuttal is in the form of administratively-noticed facts systematized in the grid. We proceed next to a summary analysis of the use of the grid.

2. *Use of the Grid.* The agency must first determine which of the three available grids or tables[37] to use, each dealing with a different level of exertional impairment,[38] since obviously a person's employability for many jobs may well depend upon the extent to which he can stand, move, or lift. Thus, the agency determines the person's residual functional capacity to perform certain levels of work. This determination is naturally an ersatz combination of medical and vocational factors.

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[33] 20 C.F.R. § 404.1503(d).

[34] 20 C.F.R. § 404.1503(e).

[35] *See* note 18 above.

[36] 42 U.S.C. § 1382c(a)(3)(B).

[37] Table 1 is for applicants able to do only sedentary work, 2 for light, and 3 for medium. The terms sedentary, light, and medium are defined in 20 C.F.R. § 404.1510.

[38] An "exertional impairment" limits the strength which an applicant can exert on the job. A non-exertional impairment might be, for example, the required use of a renal dialysis machine.

Finally, once the correct grid is selected, it is used. The grid contains in tabular form a series of rules which constitute the Secretary's interpretation of the statutory phrase "age, education, work experience,"[39] which are the determinant of ability to engage in substantial gainful activity *other than* the prior job which the impaired claimant can no longer perform. In essence the grid is a black box into which three variables are fed: age, education, and work experience. When the agency determines the three variables in any particular case the black box is cranked—*i.e.*, the final column on the grid [styled "decision"] is read—and the result spouts forth: either "disabled", or "not disabled."

It is important to note that while there are of course situations is which the particular applicant's criteria simply do not fit the grid system for one reason or another and the grid is not used,[40] where the grid *does* apply the agency—and, in particular, the ALJ—is absolutely required to read and follow the decision in the grid column labeled "decision."

Factored into the grid system is a rule-based administrative notice of the existence of a number of available unskilled jobs in the applicable economy. When the grid is used, therefore, the existence of such jobs in the economy "is established."[41] The rule does not provide for the consideration of contrary testimony on the point, and does not provide for the possibility that an applicant might offer evidence which, in fair litigation not limited by the conclusive rule, might be deemed to have overcome the administratively-noticed facts.

VI. *Holding of the ALJ.*

A. *Prima Facie Case.* The ALJ did not make an express finding upon the crucial question of whether plaintiff was

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[39] 42 U.S.C. § 1382c(a)(3)(B).

[40] 20 C.F.R. § 404.1513 Subpart P, App. 2, § 200.00(a) ("Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case. . . ."). The regulation suggests as an example a person who falls in the middle by being able to do more than light but less than medium work, in which event the grid is used simply for whatever use it may be. *Id.* at § 200.00(d).

[41] *Id.* at § 200.00(b).

able to perform his prior occupation as a house painter. A fair reading of the opinion, however, indicates that the ALJ was proceeding on the unstated but apparently universally understood foundation that plaintiff was foreclosed by his condition from performing his prior work as a house painter. The contrary conclusion would not, in any event, have been supported by substantial evidence.

Plaintiff having made out a *prima facie* case, therefore, the burden shifted to the Secretary to prove that plaintiff could perform other substantial gainful activity.[42] We must next determine whether the Secretary carried that burden.

B. *Secretary's Rebuttal.* The Secretary's "rebuttal" case could be viewed in two possible ways. In neither case is it sufficient—on the present record—to rebut the *prima facie* case.

1. *If Grid Alone.* A fair reading of the ALJ's opinion indicates that in his judgment the finding of "not disabled" was flatly compelled by the grid system. To the extent that the ALJ deemed the grid system to constitute the Secretary's rebuttal, the decision of the ALJ is not supported by substantial evidence (as required by the statute) because the grid system itself and its use in this case violated the Administrative Procedure Act[43] in two particulars.

a. *Administrative Notice Deemed Conclusive.* The grid has taken *conclusive* administrative notice of the existence of sedentary, light, and medium jobs "throughout" the national economy; under the grid "the existence of such jobs is established."[44] When the regulation states that the fact "is established," it obviously means conclusively established. Certainly it does not say otherwise. Such conclusive administrative notice expressly violates 5 U.S.C. § 556(e), providing that:

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

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[42] *See* note 18 above.

[43] 5 U.S.C. § 661 *et seq.*

[44] 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(b).

Accordingly, the regulation being contrary to an act of Congress in that respect, the case should be remanded to allow plaintiff—should he so desire—to offer evidence pursuant to 5 U.S.C. § 556(e) that work of which he is capable does not in these times of high unemployment exist "throughout" the national economy.[45]

b. *Administrative Notice by Rule.* Administrative or judicial notice in its traditional sense is ordinarily expressly taken at the hearing and, in fact, the Administrative Procedure Act—and arguably the Due Process Clause also—requires administrative notice to be expressly taken *at the hearing*. As the Court of Appeals for this Circuit recently wrote:

> The Administrative procedure Act provides in § 556(c) [sic: § 556(e)]:
>
> > When an agency decision rests on official notice of material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.
>
> The provision is unquestionably applicable to disability cases that are heard before ALJ's, because the statute, 42 U.S.C. § 405(b), requires disability decisions to be made "on the basis of evidence adduced at the hearing."
>
> . . . .
>
> Unfairness may result when facts are noticed without precisely indicating the facts and their source. A quick remark by an ALJ that he takes official notice of availability of jobs in the national economy that would be suitable for the claimant could be unfair for lack of sufficient specificity.[46]

The administrative notice of jobs taken here was procedurally invalid because there was not even a "quick remark" at the hearing, there was nothing said at the hearing

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[45] The "throughout" term is in the grid regulation, 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(b). It is not clear whether that term is intended to supplant 20 C.F.R. § 404.1509(a), but since under the grid the existence of jobs "throughout" the economy was noticed, that is what plaintiff is entitled to rebut.

[46] *White* v. *Harris*, 605 F.2d 567, 870 (5th Cir. 1979), *quoting* K. DAVIS, ADMINISTRATIVE LAW § 15.11 (supp. 1978).

at all about administrative notice which was, then, procedurally improper by reason of 5 U.S.C. § 556(e) and "evidence adduced at the hearing" requirement of 42 U.S.C. § 405(b).

The possibility that plaintiff can submit a rebuttal affidavit *on appeal* in the Appeals Council does not change the result. The statute states that the decision must be based on evidence "adduced at the hearing"[47]—it does not say on appeal—and it is inconceivable that in passing 5 U.S.C. § 556(e) Congress meant that the rebuttal evidence should be first offered on appeal.

Similarly, the right of the claimant to rebut the underlying findings of actual fact[48] (*e.g.*, age) is not the same as the opportunity to rebut the administratively-noticed fact, namely, the existence of appropriate jobs in the appropriate economy. That administratively-noticed fact is irrebuttable under the grid.

2. *If Medical Testimony.* While the findings of fact indicate that the ALJ relied purely upon the grid to rebut the *prima facie* case, it is possible that—without saying it—the ALJ was relying upon the underlying medical evidence itself in his holding that plaintiff could perform other substantial gainful activity. If so, the most likely basis for such a conclusion would be the opinion of Dr. Bridges in March of 1979 that:

> This gentleman seems to have some residual from cervical disc disease as well as an injury to his right peroneal nerve. I do believe he is employable, I see no reason why he could not perform lifting up to 50 lbs. with occasional lifting to 50 to 75 lbs. Extremely heavy activity that involves his neck and shoulders he would probably not be able to perform, however routine activities should be performed. I believe he will be able to climb stairs, perform reaching movements.[49]

The difficulty is that there was no evidence in the record bridging the gap between this *medical* finding and the *vocational* finding that plaintiff was able to perform other

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[47] 42 U.S.C. § 405(b).

[48] 20 C.F.R. § 404.1513, Subpart P, Appendix 2, § 200.00(a).

[49] Record at 128.

available substantial gainful activity. As previously discussed the grid cannot bridge the gap and, aside from the grid, the ALJ took no administrative notice of vocational factors, even assuming *arguendo* that such an approach would be sufficient under the law. And last, of course, no vocational expert testified to translate the medical findings into vocational capacity.[50] The absence of any such evidence in the record compels the conclusion that the finding of the ALJ is not supported by substantial evidence.

VII. *Propriety of Remand.* The Social Security Disability Amendments of 1980[51] amend 42 U.S.C. § 405(g) to provide that:

> The Court ... may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.[52]

A fair reading of the statute indicates that it pertains only to remands to allow the *plaintiff* to offer additional testimony.

If the statute does apply to remands to allow the Secretary to offer additional testimony, however, it does not forbid remand here because:

A. "there is new evidence which is material," namely, there should be vocational testimony, and;

B. "there is good cause for the failure to incorporate such evidence into the record in a prior proceeding," namely, reliance by the ALJ upon an existing regulation.

Surely the new provision does not simply compel entry of judgment against the Secretary in this circumstance, which is the alternative to remand.

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[50] *See McGill* v. *Harris*, 615 F.2d 365 (5th Cir. 1980); *Johnson* v. *Harris*, 612 F.2d 993 (5th Cir. 1980) (vocational expert used). *See also* Wilson v. *Califano*, ___ F.2d ___ (4th Cir. March 17, 1980) (vocational expert required).

[51] Pub.L. No. 96-265; 49 U.S.L.W. 7 (July 15, 1980).

[52] *Id.* at § 307.

CONCLUSION

When the ALJ found—or ought to have found—that plaintiff was unable to perform his former job, the burden shifted to the Secretary to prove her defense, namely, that plaintiff was able to do *other* work in the other economy. The Secretary failed to carry her burden on rebuttal because:

1. There was no oral testimony explaining what work plaintiff could do, given the medical findings;

2. No vocational evidence outside the grid was administratively noticed, even assuming that such a procedure would be valid;

3. The grid cannot serve as the requisite rebuttal testimony because:

A. the regulation precluding plaintiff's adducing contrary rebuttal employment evidence at the hearing violates 5 U.S.C. § 556(e) in that it was improperly *conclusive* administrative notice, and;

B. the administrative notice taken violated 42 U.S.C. § 405(b)'s "adduced at the hearing" requirement and 5 U.S.C. § 556(e) because the ALJ did not even mention at the hearing that he was administratively noticing anything.

Accordingly, this case must be remanded to give the Secretary an opportunity to offer valid evidence contrary to plaintiff's *prima facie* case or, if none, to award benefits to plaintiff.

DONE this 20th day of August, 1980.

/s/ DAVID A. BAGWELL

United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 79-0730-H

RICHARD D. HOLMES, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS, Secretary of Health and Human Services, DEFENDANT.

ORDER AND JUDGMENT

After due and proper consideration,[1] and upon the recommendation of the Magistrate, which is adopted as the opinion of this Court, it is ORDERED, ADJUDGED and DECREED that the Administrative decision be and is hereby VACATED, and that this cause be REMANDED to the Secretary of Health and Human Resources for additional proceedings not inconsistent with the opinion of this Court, no costs to be taxed.

DONE this 11th day of December, 1980.

/s/ W. B. HAND

UNITED STATES DISTRICT JUDGE

[1]To the cases cited by the Magistrate the Court adds Fruge v. Harris, No. 80-3476 (5th Cir. Dec. 4, 1980).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 79-0730-H

RICHARD D. HOLMES, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS, Secretary of Health and Human Services, DEFENDANT.

RECOMMENDATION OF MAGISTRATE

Plaintiff filed suit in this Court as provided by 42 U.S.C. § 405(g) for review of an adverse decision of an Administrative Law Judge ["ALJ"] on a Social Security Disability Claim. The Court referred this matter to the Magistrate for preliminary review of the administrative record[1] and recommendation. The matter is submitted upon the basis of the pleadings, record, and highly instructive briefs and oral argument of the parties and an *amicus curiae*.[2]

Congress provided that in such a case the Court shall have power to enter judgment upon the pleadings and transcript, or to remand the case.[3] The Magistrate recommends that this cause be remanded for the taking of additional evidence, since the Secretary's only rebuttal to plaintiff's *prima facie* case was in the form of matter administratively noticed in a manner violating the Administrative Procedure Act,[4] the Social Security Act,[5] the applicable decisional law in this Circuit,[6] and the terms of the administrative notice regulation itself[7] and, therefore the decision of the ALJ

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[1] 28 U.S.C. § 636(b)(3); *Mathews v. Weber*, 423 U.S. 261 (1976).

[2] Legal Services Corporation of Alabama, an organization whose attorneys have substantial day-to-day experience with the conduct of all phases of Social Security disability work.

[3] 42 U.S.C. § 405(g).

[4] 5 U.S.C. § 556(e).

[5] 42 U.S.C. § 405(b).

[6] *White v. Harris*, 605 F.2d 867 (5th Cir. 1979).

[7] 20 C.F.R. § 404.1513 Subpart P Appendix 2 [hereafter "the grid"] at § 200.00(e)(2).

was not supported by substantial evidence as required by 42 U.S.C. § 405(g).

I. *Procedural History.*

A. *Prior Claims.* Plaintiff has filed three separate applications for Social Security benefits. The first application was filed in May of 1977, claiming disability from a 1976 back injury. The application was denied and no further action was taken.

In September of 1977, plaintiff filed his second application, claiming disability for the same back injury. The application was denied, and the denial was taken to an Administrative Law Judge, who found the plaintiff entitled to an award of disability from October, 1976 through October, 1977. The plaintiff filed an untimely appeal from the ALJ's decision; no further action was taken.

The third (and present) application was filed in December of 1978, claiming disability for back surgery, headaches and a stiff neck, dating back to October, 1976. The Social Security Administration denied the claim, the ALJ denied the claim, and the Appeals Council declined to review the decision of the ALJ.

The ALJ found in substance that:

1. The claimant met the threshold requirements;

2. Claimant would be defined as a "younger individual";

3. Claimant completed the twelfth grade but could neither read nor write, and was therefore illiterate;

4. Claimant had worked as a "co-layer" [sic: collator][8] in the plywood industry and as a laborer in the construction industry;

5. Medical evidence revealed that claimant had a prior period of disability from August of 1976 to October of 1977, because of a back injury and a laminectomy. Claimant's physician indicated that as of November 1, 1977, claimant could return to substantial gainful activity;

6. Considering the claimant's maximum sustained work capacity, age, education, and work experience, he was *not* disabled after November 1, 1977.

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[8] A "collator" in a plywood mill takes the thin sheets of wood and puts them together until the plywood reaches the appropriate thickness.

II. *Evidence of Record.*

A. *Employment Background.* Plaintiff is a thirty-seven year old man who, though he somehow completed high school, is quite illiterate. His last in a series of laborer's jobs was in 1976, when he worked in a plywood mill. He, his wife, and four children live on $144 per month from the Aid for Dependent Children program, and Supplemental Security income.

B. *Alleged Medical Problems.* Plaintiff claims that he is disabled because of a back injury sustained in October, 1976. He complains of headaches, a stiff neck and numbness on his right side.

C. *Medical Testimony.* The ALJ found that plaintiff was not disabled after November 1, 1977. In order to understand the background of the case, however, it is appropriate to review the medical treatment prior to that time.

1. *Prior to November 1, 1977.* Plaintiff has had back trouble since late 1972, from an injury. Pain increased thereafter, and a Pensacola doctor in April of 1974 diagnosed lumbosacral strain and probable intervertabral disc disease in the lumbosacral area, recommending a back brace, traction, and muscle-relaxing drugs.[9] By early 1975 the same doctor opined that plaintiff could not perform continued heavy lifting or back-straining activity.[10]

In August, 1976 plaintiff hurt his back again and, following a diagnosis of herniated disc and lumbosacral strain, was hospitalized for conservative treatment.[11] For the next several months plaintiff's back was treated in a variety of methods by a variety of doctors, both in and out of the hospital.[12]

2. *After November 1, 1977.* In March, 1978, a Montgomery neurosurgeon treated plaintiff for his neck, shoulder, arm and back pain, sleeping problems in certain positions, stumbling, and decreased libido.[13] A myelogram showed a vertebral defect and inflammation of the root of

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[9] Record at 142.

[10] *Id.* at 140.

[11] *Id.* at 106.

[12] *Id.* at 113-14, 116, 117-18, 127, 131, 133-34.

[13] *Id.* at 233.

the spinal nerve,[14] resulting in a diagnosed medical disability of 15% and work disability of 30%.[15] By the summer of 1978 one doctor opined that plaintiff could not return to his regular job and would have to do sedentary work,[16] and by the end of 1978 plaintiff's diagnosis was for permanent disability without recovery.[17] In early 1979 an orthopedic surgeon opined that plaintiff could only carry 25 pounds frequently and 50 occasionally, and could only sit or stand for six hours out of a work day, and could not climb, bend, or stoop. In August, 1979, the last analysis, plaintiff remained permanently disabled.[18]

D. *Plaintiff's Testimony.* Plaintiff testified that he feels bad all day long and that when he tries to get up and do things he feels considerable pain,[19] and can walk only a short distance.[20] He has headaches and a very stiff neck[21] and numbness on his right side in his shoulder, arm and leg.[22] He has problems with constipation and with his kidneys.[23] He does not remember things as well as he did before he got hurt,[24] he could not operate machinery when he is taking his medications,[25] he wears a back support,[26] and is in traction for four hours a day.[27] The plaintiff is on a variety of medications for pain, nervousness, and constipation.[28]

III. *Applicable Law in General.* The Social Security Act: sets forth a two-part test for determining "disability" under the Act: First, there must be a "medically determinable physical or mental impairment which can

[14] *Id.* at 220, 227.
[15] *Id.* at 230.
[16] *Id.* at 235.
[17] *Id.* at 238.
[18] *Id.* at 256.
[19] *Id.* at 39.
[20] *Id.* at 38.
[21] *Id.* at 36.
[22] *Id.* at 40.
[23] *Id.* at 46.
[24] *Id.* at 46.
[25] *Id.* at 46.
[26] *Id.* at 37.
[27] *Id.* at 49.
[28] *Id.* at 255.

be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. . . ." 42 U.S.C. § 1382c(a)(3)(A). Second, this impairment must be so severe that the claimant is "not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." *Id.* § 1382c(a)(3)(B).[29]

If plaintiff shows that he cannot now perform his former job, the burden shifts to the Secretary to show both that the claimant is able to perform other work, and that such other work is in fact available in the economy.[30] The availability of work is normally proven either by the testimony of a vocational expert[31] or by administrative notice[32] if properly taken.[33]

IV. *Standard of Review.* Congress has clearly provided that in a Social Security case the administrative findings "as to any fact, if supported by substantial evidence, shall be conclusive. . . ."[34] This Court's function is strictly limited; we may only determine whether the administrative findings are supported by "substantial evidence" considering the record as a whole.[35]

The term "substantial evidence" in this circumstance means:

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[29] *Chaney v. Califano* 588 F. 2d. 958, 959 (5th Cir. 1979).

[30] *McGill v. Harris*, 615 F.2d 365 (5th Cir. 1980); *Johnson v. Harris*, 612 F.2d 993 (5th Cir. 1980); *White v. Harris*, 605 F.2d 867, 869 (5th Cir. 1979); *Knott v. Califano*, 559 F.2d 279, 280 (5th Cir. 1977).

[31] *E.g., Chaney v. Califano*, 588 F.2d 958, 960 (5th Cir. 1979).

[32] *Brown v. Finch*, 429 F.2d 80, 82 (5th Cir. 1970); *Breaux v. Finch* 421 F.2d 687, 689 (5th Cir. 1970).

[33] *White v. Harris*, 605 F.2d 867, 870 (5th Cir. 1979).

[34] 42 U.S.C. § 405 (g).

[35] *Chaney v. Califano*, 588 F.2d 958, 959 (5th Cir. 1979); *Mims v. Califano*, 581 F. 2d 1211, 1213 (5th Cir. 1978); *Rivas v. Weinberger*, 576 F.2d 255, (5th Cir. 1973).

> more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[36]

The test is undoubtedly quite strict. Though it may be "so stringent that it has been described as bordering on the unrealistic,"[37] it is nevertheless true that "the claimant's burden of proof is not unsuperable."[38]

V. *Medical-Vocational Guidelines* ["*The Grid*"]. The resolution of this case is inextricably interwoven with the applicability and validity of the new "Medical-Vocational Guidelines"[39] or, more commonly, "the grid" and its attendant explanatory regulations. While plaintiff did not in his complaint specifically challenge the use of the grid, he did allege that the findings of the ALJ were not supported by substantial evidence. Since the conclusion of the ALJ is based upon the grid, the decision of the ALJ is supported by substantial evidence *only* if the grid is to be applied, if it was properly applied, and if the grid establishes a system of adjudication not at variance with the statutes, Constitution, or decisional laws of the United States.

A. *The Medical-Vocational Guidelines* ["*The Grid*"]. In the middle 1970's the Social Security Administration began[40] an internal study of the possibility of adoption of regulations providing increased use of administrative presumptions and administrative notice, having a view toward both administrative efficiency and nationwide uniformity in Social Security Disability determinations. The new regulations became effective on February 26, 1979.[41] Because parts are displayable as a simple chart or table, the

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[36] *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

[37] *Johnson v. Harris*, 612 F.2d 993, (5th Cir. 1980), *quoting Williams v. Finch*, 440 F.2d 613, 615 (5th Cir. 1971).

[38] *Simmons v. Harris*, 602 F.2d 1233, 1236 (5th Cir. 1979), *quoting Mims v. Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978).

[39] 20 C.F.R. § 404.1513 Subpart P. App.2, § 200.00 *et seq.*

[40] The work was apparently at the prodding of certain congressional committees and the General Accounting Office. Since no statute was passed, however, the work should be treated as a pure executive branch effort.

[41] The hearing in this case occurred six months later.

Medical-Vocational Guidelines are commonly called "the grid" a usage which, though technically limited to the tables themselves, commonly includes the attendant explanatory matter.

1. *The Grid in Perspective: Pre-Grid Analysis.* There is a sequential analysis by which the agency determination reaches the level at which the grid is used, the entire process moving toward a determination of whether or not an applicant is "disabled" within the meaning of 42 U.S.C. § 1382 c(3). Several preliminary steps are involved.

The several steps are, in sum, these:

First, the agency determines whether the person is actually working.[42] If so, the agency conclusively presumes that the applicant is not disabled and the claim must be denied;[43] but if not, the agency moves to the second step.

Second, the agency must determine whether the claimed impairment is "severe."[44] If not, the claim is denied on medical evidence alone; but if so, the agency moves to the third step.

Third, the agency determines whether the applicant's impairment equals or exceeds in severity a list of impairments.[45] If so, the applicant is entitled to benefits, but if not, the agency goes to the fourth step.

Fourth, the agency determines whether the applicant is able to perform his or her past work.[46] If so, the agency finds that the applicant is not disabled under the law, but if not, the agency moves to the fifth step. At this point the burden shifts to the Secretary.[47]

Fifth, and last, the agency must determine whether the applicant is able—despite his or her inability to perform his or her prior work—to perform other substantial gainful activity considering his or her age, education, and work

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[42] 20 C.F.R. § 404.1503(b).

[43] By comparison, judge-made law in other areas recognizes that a person, though injured, is often "required to work in order to survive." *Vaughn v. Atkinson*, 369 U.S. 527, 533 (1962) (maintenance and cure under the general maritime law).

[44] 20 C.F.R. § 404.153(c).

[45] 20 C.F.R. § 404.1503(d).

[46] 20 C.F.R. § 404.1503(e).

[47] *See* note 30 above.

experience.[48] It must be continually recalled that by this point the burden has already shifted to the Secretary to rebut plaintiff's *prima facie* case. The *grid system* is designed to constitute the Secretary's rebuttal to the claimant's *prima facie* case, and the entire rebuttal is in the form of administratively-noticed facts systematized in the grid. We proceed next to a summary analysis of the use of the grid.

2. *Use of the Grid.* The agency must first determine which of the three available grids or tables[49] to use, each dealing with a different level of exertional impairment,[50] since obviously a person's employability for many jobs may well depend upon the extent to which he can stand, move, or lift. Thus, the agency determines the person's residual functional capacity to perform certain levels of work. This determination is naturally an ersatz combination of medical and vocational factors.

Finally, once the correct grid is selected, it is used. The grid contains in tabular form a series of rules which constitute the Secretary's interpretation of the statutory phrase "age, education, work experience",[51] which are the determinates of ability to engage in substantial gainful activity *other than* the prior job which the impaired claimant can no longer perform. In essence the grid is a black box into which three variables are fed: age, education, and work experience. When the agency determines the three variables in any particular case the black box is cranked—*i.e.*, the final column on the grid [styled "decision"] is read—and the result spouts forth: either "disabled", or "not disabled."

It is important to note that while there are of course situations in which the particular applicant's criteria simply do not fit the grid system for one reason or another and the

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[48] 42 U.S.C. § 1382c(a)(3)(B).

[49] Table 1 is for applicants able to do only sedentary work, 2 for light, and 3 for medium. The terms sedentary, light, and medium are defined in 20 C.F.R. § 404.1510.

[50] An "exertional impairment" limits the strength which an applicant can exert on the job. A non-exertional impairment might be, for example, the required use of a renal dialysis machine.

[51] 42 U.S.C. § 1382c(a)(3)(B).

grid is not used,[52] where the grid *does* apply the agency—and, in particular, the ALJ—is absolutely required to read and follow the decision in the grid column labelled "decision."

Factored into the grid system is a rule-based administrative notice of the existence of a number of available unskilled jobs in the applicable economy. When the grid is used, therefore, the existence of such jobs in the economy "is established."[53] The rule does not provide for the consideration of contrary testimony on the point, and does not provide for the possibility that an applicant might offer evidence which, in fair litigation not limited by the conclusive rule, might be deemed to have overcome the administratively-noticed facts.

3. *Propriety of the Application of the Grid System to this Case.* The grid system is designed for the analysis of purely exertional limitations. Here, plaintiff testified that he had not only exertional limitations (*i.e.*, he was not strong), but also had at least one and possibly two non-exertional limitations; namely, he had to undergo traction four hours a day[54] and he took medicine which affected his ability to operate machinery[55] and at least arguably affected his mental ability.[56] The grid regulation provides that:

> Where an individual has both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a framework for consideration of how much the individual's work

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[52] 20C.F.R. § 404.1513 Subpart P, App.2, § 200.00(a) ("Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case . . ."). The regulation suggests as an example a person who falls in the middle by being able to do more than light but less than medium work, in which event the grid is used simply for whatever use it may be. *Id.* at § 200.00(d).

[53] *Id.* at § 200.00(b).

[54] Record at 49.

[55] *Id.* at 46.

[56] *Id.*

> capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations.[57]

Thus, the case should not be squarely governed by the grid, though the ALJ applied the grid pure and simple. Four hours of traction and dulling medication obviously have at least *some* effect upon a person's employability,[58] and the ALJ either did not consider its effect or, if he did, did not explain why it had no effect. Accordingly, upon this ground, the case is required to be remanded for determination after due consideration of the non-exertional limitations and other factors outside the grid system.

4. *Repugnancy of Grid System to the Administrative Procedure Act.* Alternatively, even if the ALJ were correct under the regulation in applying the grid, the grid system itself is void for repugnancy to the Administrative Procedure Act[59] in two particulars, both relating to the use of administrative notice.

a. *Administrative Notice Deemed Conclusive.* The grid has taken *conclusive* administrative notice of the existence of sedentary, light, and medium jobs "throughout" the national economy; under the grid "the existence of such jobs is established."[60] When the regulation states that the fact "is established," it obviously means conclusively established. Certainly it does not say otherwise. Such conclusive administrative notice expressly violates 5 U.S.C. § 556(e), providing that:

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Accordingly, the regulation being contrary to an act of Congress in that respect, the case should be remanded to allow plaintiff—should he so desire—to offer evidence pursuant to 5 U.S.C. § 556(e) that work of which he is capable does not in these times of high unemployment exist "through-

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[57] 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00 (e)(2).

[58] *See Harrell v. Harris*, 610 F.2d 355 (5th Cir. 1980) (pre-grid case in which regimen of traction and drugs required finding of disability).

[59] 5 U.S.C. §661 *et seq.*

[60] 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(b).

out" the national economy[61] for a middle-aged illiterate with back trouble requiring a daily regimen of hours of traction and constant dulling drugs.

b. *Administrative Notice by Rule.* Administrative or judicial notice in its traditional sense is ordinarily expressly taken at the hearing and, in fact, the Administrative Procedure Act—and arguably the Due Process Clause also—requires administrative notice to be expressly taken *at the hearing.* As the Court of Appeals for this Circuit recently wrote:

> The Administrative Procedure Act provides in § 556 (c) [sic: § 556(e)]:
>
> > When an agency decision rests on official notice of material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.
>
> The provision is unquestionably applicable to disability cases that are heard before ALJs, because the statute, 42 U.S.C. § 405(b), requires disability decisions to be made "on the basis of evidence adduced at the hearing."
>
> . . . .
>
> Unfairness may result when facts are noticed without precisely indicating the facts and their source. A quick remark by an ALJ that he takes official notice of availability of jobs in the national economy that would be suitable for the claimant could be unfair for lack of sufficient specificity.[62]

The administrative notice of jobs taken here was procedurally invalid because there was not even a "quick remark" at the hearing, there was nothing said at the hearing *at all* about administrative notice which was, then, procedurally improper by reason of 5 U.S.C. § 556(e) and "evidence adduced at the hearing" requirement of 42 U.S.C. § 405(b).

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[61] The "throughout" term is in the grid regulation, 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(b). It is not clear whether that term was intended to supplant 20 C.F.R. § 404.1509(a), but since under the grid the existence of jobs "throughout" the economy was noticed, that is what plaintiff is entitled to rebut.

[62] *White v. Harris,* 605 F.2d 867, 870 (5th Cir. 1979), *quoting* K. DAVIS, ADMINISTRATIVE LAW § 15.11 (Supp. 1978).

The Secretary contends that there is no such violation because plaintiff can submit a rebuttal affidavit *on appeal* in the Appeals Council. The statute, however, states that the decision must be based on evidence "adduced at the hearing"[63]—it does not say on appeal—and it is inconceivable that in passing 5 U.S.C. § 556(e) Congres meant that the rebuttal evidence should be first offered on appeal.

Similarly, the right of the claimant to rebut the underlying findings of actual fact[64] (*e.g.*, age) is not the same as the opportunity to rebut the administratively-noticed fact, namely, the existence of appropriate jobs in the appropriate economy. That administratively-noticed fact is irrebuttable under the grid.

It is not necessary to reach the other contentions.[65]

CONCLUSION

When the ALJ found that plaintiff was unable to perform his former job, the burden shifted to the Secretary to prove her defense, namely, that plaintiff was able to do *other* work in the economy. The *only* way the Secretary tried to do so was by the taking of rule-based administrative notice under the Medical-Vocational Guidelines. That administrative notice was improper because:

1. The grid ought not to have been applied in a Procrustean fashion because plaintiff had non-exertional limitations which limited his employability, and;

2. The regulation precluding plaintiff's adducing contrary rebuttal employment evidence at the hearing violates 5 U.S.C. § 556(e) in that it was improperly *conclusive* administrative notice, and;

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[63] 42 U.S.C. § 405(b).

[64] 20 C.F.R. § 404.1513, Subpart P, Appendix 2, § 200.00(a).

[65] For example, plaintiff contended that if he had been slightly older the grid would have required a finding of disability, and that therefore the grid effects a constitutionally-improper irrebutable presumption on the effects of age on different individuals. Having determined the case on statutory grounds, we need not reach the constitutional issue. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). The grid has, however, survived constitutional challenge elsewhere on this point. *Stallings v. Harris*, Civ. No. 79-1051 (U.S.DIST.CT.W.D. Tenn. July 10, 1980) (op. at p.8-9).

3. The administrative notice taken violated 42 U.S.C. § 405(b)'s "adduced at the hearing" requirement and 5 U.S.C. § 556(e) because the ALJ did not even mention at the hearing that he was administratively noticing anything.

Because the only evidence offered against plaintiff's *prima facie* case was improper for three different reasons, the decision of the ALJ is not based upon substantial evidence.

Accordingly, this case must be remanded to give the Secretary an opportunity to offer valid evidence contrary to plaintiff's *prima facie* case or, if none, to award benefits to plaintiff.

DONE this 15th day of August, 1980.

/s/ _____

DAVID A. BAGWELL
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 80-0500-H

CORINNE LITTLE, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS
Secretary of Department of Health and Human Services,
DEFENDANT.

ORDER AND JUDGMENT

After due and proper consideration, and upon the recommendation of the Magistrate, which is adopted as the opinion of this Court, it is ORDERED, ADJUDGED and DECREED that the Administrative decision be and is hereby VACATED, and that this cause be REMANDED to the Secretary of Health and Human Resources for additional proceedings not inconsistent with the opinion of this Court, no costs to be taxed.

DONE this 10th day of Feb., 1981.

/s/ _____
W. B. HAND
United States District Judge

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND EXAMINED THIS THE
10th Day of Feb.
1981 Minute Entry
No. 52,293
William J. O'Connor, Clerk
By G. Walter
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 80-0500-H

CORINNE LITTLE, PLAINTIFF

v.

PATRICIA ROBERTS HARRIS,
Secretary of Department of Health and Human Services,
DEFENDANT.

RECOMMENDATION OF MAGISTRATE

Plaintiff filed suit in this Court as provided by 42 U.S.C. § 405(g) for review of an adverse decision of the Administrative Law Judge ["ALJ"] on a Social Security claim. The Court referred the case to the Magistrate for preliminary review of the administrative record[1] and recommendation.

Congress provided that in such a case the Court shall have power to enter judgment upon the pleadings and transcript, or to remand the case. 42 U.S.C. § 405(g).

I. *Procedural History.* On October 17, 1978, plaintiff filed a claim with the Social Security Administration seeking an entitlement to a "period of disability" under 42 U.S.C. § 416(i), and Social Security Disability Insurance benefits as provided by 42 U.S.C. § 423. The application was denied and no further action was taken. The plaintiff filed a second claim for disability benefits and an application for Supplemental Security Income as provided by 42 U.S.C. §§ 1381-1383(c) on June 30, 1979. The applications were denied initially and on reconsideration by the Agency, and plaintiff thereupon sought a hearing before an ALJ.

The ALJ held a 31-minute hearing on February 15, 1980, at which plaintiff was represented by an attorney, and the plaintiff and two witnesses testified. The ALJ denied the claim, finding in substance that:

1. Claimant met the threshold requirements;

[1] 28 U.S.C. § 636(b)(3); *Mathews* v. *Weber*, 423 U.S. 261 (1976).

2. Claimant had the following impairments: gastrointestinal complaints and carcinoma of the lungs;

3. Claimant's allegations of stomach discomfort and nervousness were not credible;

4. Claimant's impairments did not prevent her from performing work requiring lifting ten or less pounds frequently and walking and/or standing for two or three hours of the work day;

5. Claimant was unable to perform her past relevant work as a barmaid; this work required such movement as pushing, pulling, climbing, fine manipulation and reaching;

6. Claimant had the residual functional capacity for sedentary work as defined by the regulations;

7. Claimant was 44 years old, which was defined as a younger individual;

8. Claimant had an eighth-grade education (limited);

9. The issue of transferability of work skills was not material;

10. Regulations directed that claimant, considering her maximum sustained work capability, age, education, and work experience, be found "not disabled";

11. Claimant was not under a "disability" as defined in the Social Security Act.

The Appeals Council refused the request to review the decision of the ALJ and plaintiff thereupon sought review in this Court of the decision of the ALJ, the final administrative decision.

II. *Evidence of Record.*

A. *Employment Background.* Plaintiff is a 45-year-old unmarried woman with an eighth-grade education. She worked from 1959 until October, 1978, as a barmaid; she worked the last five months as an assistant manager, which the bar owner let her do because she needed to be sitting down. She has had no income, except help from her sisters and friends, since October 1978.[2]

B. *Alleged Medical Problems.* Plaintiff claims that she has been disabled since October 13, 1978, because of her stomach and lung.[3]

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[2] *Record* at 30-33, 43-4, 90.

[3] *Id.* at 64.

C. *Medical Evidence.* The medical records reveal that, at the request of the Vocational Rehabilitation Center, plaintiff was examined by Dr. Russell March, a Mobile internist with a specialty in cardiovascular disease. On October 26, 1979, Dr. March wrote the vocational counselor that plaintiff was complaining of abdominal pain and was diagnosed as having a large hiatus hernia (the protrusion of any structure through the esophageal hiatus of the diaphragm) but with no reflux esophagitis (inflammation of the esophagus). He did not feel that surgery was needed and recommended adjusting the plaintiff's medications.[4]

On May 31, 1979, plaintiff was admitted to the Providence Hospital by Dr. E. H. Borak, a gastroenterologist, for evaluation of gastrointestinal complaints and, while she was in the hospital, it was found that she had a lesion in the right upper lobe of her right lung. A right upper lung lobectomy (excision of a lobe) was performed by Dr. Phillip Snodgrass, a general surgeon, and the pathological diagnosis was adenocarcinoma (carcinoma derived from glandular tissue or in which the tumor cells form recognizable glandular structures). Plaintiff's post-operative course was described as fairly benign except for her gastrointestinal complaints which were symptomatic of a hiatus hernia. She was discharged on June 25, 1979, with a guarded prognosis and an estimated total and permanent disability.[5]

Dr. Snodgrass filed a report on October 15, 1979 with the Agency, indicating that following plaintiff's discharge from the hospital on June 25, 1979, he had seen her in the office on July 3, September 5, and September 25, 1979. He stated that plaintiff had a very restrictive chronic obstructive pulmonary disease in addition to her carcinoma which was static at that time. He recommended total and permanent disability.[6]

Dr. Raymond Bell, an internist with a specialty in gastroenterology, wrote to the Disability Determination Unit that on October 31, 1979, he had examined the plain-

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[4] *Id.* at 126.
[5] *Id.* at 130-31.
[6] *Id.* at 124.

tiff with complaints of hyperventilation, weakness and abdominal pain. Plaintiff's history included cancer of the uterus which required a hysterectomy eight years earlier and cancer of the lung which required a right upper lobectomy. Plaintiff told the doctor that she had chronic abdominal pain which was located diffusely throughout the abdomen. She was on medication to relieve the pain. She also complained of becoming very excited rather easily, which, she said, was followed by tingling and strange sensations in her hands, shortness of breath, and sometimes chest pains. X-rays taken in consultation by Dr. Charles Shopfner, a radiologist, indicated that plaintiff had moderate generalized pulmonary emphysema.[7]

Dr. Bell completed a Physical Capacities Evaluation form indicating that in his opinion, plaintiff could be expected to lift and/or carry ten pounds or less frequently; stand and walk up to three hours in a normal day; and could not be expected to sit and work as much as six out of eight hours a day. He indicated that the plaintiff should be restricted from pushing and pulling movements, climbing and balancing, fine manipulation, and reaching. He stated that she had a weakness in her right hand and that he did not think that she could mentally function in any stressful situation.[8]

On December 28, 1979, Dr. David Clarkson, an internist, hemotologist and oncologist, wrote To Whom It May Concern that the plaintiff was under his care for a variety of somatic (pertaining to or characteristic of the soma or body) complaints; and while under his care, had been unable to return to work. The doctor stated that the plaintiff was scheduled for a biopsy of a new mass lesion to rule out breast carcinoma.[9]

Dr. Snodgrass wrote to the plaintiff's lawyer on January 30, 1980, stating that a lesion removed from plaintiff's breast on December 28, 1980, was found to be a benign disease. He noted that plaintiff still had epigastric distress. Although a favorable prognosis was expected for plaintiff and no recurrence had been identified, it was Dr.

[7] *Id.* at 164, 168.
[8] *Id.* at 171.
[9] *Id.* at 175.

Snodgrass' opinion that any patient who had carcinoma of the lung should be considered totally and permanently disabled. He also stated that plaintiff should not be considered disabled because of her breast disease or her epigastric distress.[10]

D. *Plaintiff's Testimony.* Plaintiff testified that she is not presently able to drive because of her vision, her nerves, and because she is not alert. She said that in March of 1978, she did go to Vocational Rehabilitation and that they paid some of the doctor's bills but she never got started in a job because she went into the hospital. Her hobby was working in the garden but she is not able to do that because she feels like she has the flu, she runs a temperature and is in pain. She says her body will not let her stay up to work; she is not even able to clean house. Plaintiff said that her stomach feels like it is inflammed, and that it is sore and painful; she never has a normal bowel movement. At the time of the hearing, she was taking four different medications for pain, nerves, and her stomach.[11]

E. *Witnesses.*

1. Dennis Simmons testified that he had been a friend of the plaintiff for years and had seen her frequently since October, 1978. He has helped take care of the plaintiff during the period when she was not able to care for herself at all. In his opinion, she is so weak that she is not physically able to do anything. He stated that it is hard for her to get from the bed to the kitchen table. He does not think she would be able to do the work required of a waitress.[12]

2. Irene Simmons testified that the plaintiff can move around but that she cannot stay up for very long because she is weak. When she tries to do something like grocery shopping, she exhausts herself very quickly. In her opinion, the plaintiff is not able to perform her former job as a waitress.[13]

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[10] *Id.* at 176.
[11] *Id.* at 31-33, 37-40.
[12] *Id.* at 46-8.
[13] *Id.* at 49-50.

III. *Applicable Law in General.* The Social Security Act:

> sets forth a two-part test for determining "disability" under the Act: First, there must be a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months ...." 42 U.S.C. § 1382c(a)(3)(A). Second, this impairment must be so severe, that the claimant is "not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." *Id.* § 1382c(a)(3)(B).[14]

If plaintiff shows that she cannot now perform her former job, the burden shifts to the Secretary to show both that the claimant is able to perform other gainful work, and that such other work is in fact available in the applicable economy.[15] The availability of work is normally proven either by the testimony of a vocational expert[16] or perhaps by administrative notice[17] if properly taken.[18]

IV. *Standard of Review.* Congress has clearly provided that in a Social Security case the administrative findings "as to any fact, if supported by substantial evidence, shall be conclusive ...."[19] This Court's function is strictly

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[14] *Chaney* v. *Califano*, 588 F.2d 958, 959 (5th Cir. 1979).

[15] *McGill* v. *Harris*, 615 F.2d 365 (5th Cir. 1980); *Johnson* v. *Harris*, 612 F.2d 993 (5th Cir. 1980); *White* v. *Harris*, 605 F.2d 867, 859 (5th Cir. 1979); *Knott* v. *Califano*, 559 F.2d 279, 280 (5th Cir. 1977).

[16] *E.g.*, *Chaney* v. *Califano*, 588 F.2d 958, 960 (5th Cir. 1979).

[17] *Brown* v. *Finch*, 429 F.2d 80, 82 (5th Cir. 1970); *Breaux* v. *Finch*, 421 F.2d 687, 689 (5th Cir. 1970).

[18] *White* v. *Harris*, 605 F.2d 867, 870 (5th Cir. 1979).

[19] 42 U.S.C. § 405(g).

limited; we may only determine whether the administrative findings are supported by "substantial evidence" considering the record as a whole.[20]

The term "substantial evidence in this circumstance means:

> more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[21]

The test is undoubtedly quite strict. Though it may be "so stringent that it has been described as bordering on the unrealistic,"[22] it is nevertheless true that "the claimant's burden of proof is not insuperable."[23]

V. *Analysis.* Since the ALJ found that plaintiff was no longer able to perform her former employment the burden fell to the Secretary to rebut plaintiff's *prima facie* case.[24] In sum, the burden rested upon the Secretary to introduce evidence that plaintiff could perform gainful work.

Even assuming *arguendo*[25] that there is medical evidence in the record based upon which a vocational expert could render an opinion both as to plaintiff's vocational ability and the availability of appropriate work, no such vocational evidence was adduced.

Thus, when the burden shifted to the Secretary, the only evidence of the availability of other gainful employment or of plaintiff's vocational capacity to do it came from the Medical-Vocational Guidelines, or the grid. As discussed in the next section, the grid does not suffice in this case to rebut plaintiff's *prima facie* case.

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[20] *Chaney* v. *Califano*, 588 F.2d 958, 959 (5th Cir. 1979); *Mims* v. *Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978); *Rivas* v. *Weinberger*, 576 F.2d 255, (5th Cir. 1973).

[21] *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 229 (1938).

[22] *Johnson* v. *Harris*, 612 F.2d 993 (5th Cir. 1980), *quoting Williams* v. *Finch*, 440 F.2d 612, 615 (5th Cir. 1971).

[23] *Simmons* v. *Harris*, 602 F.2d 1233, 1236 (5th Cir. 1979), *quoting Mims* v. *Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978).

[24] *See* note 15 above.

[25] This assumption is quite likely to be incorrect, though we need not so find.

VI. *Medical-Vocational Guidelines* [*"The Grid"*]. The resolution of this case is inextricably interwoven with the applicability and validity of the new "Medical-Vocational Guidelines"[26] or, more commonly, "the grid" and its attendant explanatory regulations. Since the vocational conclusion of the ALJ is at bottom based solely upon the grid, the decision of the ALJ is supported by substantial evidence *only* if the grid is to be applied, if it was properly applied, and if the grid establishes a system of adjudication not at variance with the statutes, Constitution, or decisional laws of the United States.

A. *The Medical-Vocational Guidelines* [*"The Grid"*]. In the Middle 1970's the Social Security Administration began[27] an internal study of the possibility of adoption of regulations providing increased use of administrative presumptions and administrative notice, having a view toward both administrative efficiency and nationwide uniformity in Social Security Disability determinations. The new regulations become effective on February 26, 1979.[28] Because parts are displayable as a simple chart or table, the Medical-Vocational Guidelines are commonly called "the grid," a usage which, though technically limited to the tables themselves, commonly includes the attendant explanatory matter.

1. *The Grid in Perspective: Pre-Grid Analysis.* There is a sequential analysis by which the agency determination reaches the level at which the grid is used, the entire process moving toward a determination of whether or not an applicant is "disabled" within the meaning of 42 U.S.C. § 1382c(3). Several preliminary steps are involved.

The several steps are, in sum, these:

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[26] 20 C.F.R. § 404.1513 Subpart P, App. 2, § 200.00 *et seq.*

[27] The work was apparently at the prodding of certain congressional committees and the General Accounting Office. Since no statute was passed, however, the work should be treated as a pure executive branch effort.

[28] The hearing in this case occurred one year later, on February 15, 1980.

First, the agency determines whether the person is actually working.[29] If so, the agency conclusively presumes that the applicant is not disabled and the claim must be denied;[30] but if not, the agency moves to the second step.

Second, the agency must determine whether the claimed impairment is "severe."[31] If not, the claim is denied on medical evidence alone; but if so, the agency moves to the third step.

Third, the agency determines whether the applicant's impairment equals or exceeds in severity a list of impairments.[32] If so, the applicant is entitled to benefits, but if not, the agency goes on to the fourth step.

Fourth, the agency detemines whether the applicant is able to perform his or her past work.[33] If so, the agency finds that the applicant is not disabled under the law, but if not, the agency moves to the fifth step. At this point the burden shifts to the Secretary.[34]

Fifth, and last, the agency must determine whether the applicant is able—despite his or her inability to perform his or her prior work—to perform other substantial gainful activity considering his or her age, education, and work experience.[35] It must be continually recalled that by this point the burden has already snifted to the Secretary to rebut plaintiff's *prima facie* case. The grid system is designed to constitute the Secretary's rebuttal to the claimant's *prima facie* case, and the entire rebuttal is in form of administratively-noticed facts systematized in the grid. We proceed next to the summary analysis of the use of the grid.

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[29] 20 C.F.R. § 404.1503(b).

[30] By comparison, judge-made law in other areas recognizes that a person, though injured, is often "required to work in order to survive." *Vaughn* v. *Atkinson*, 369 U.S. 527 533 (1962) (maintenance and cure under general maritime law).

[31] 20 C.F.R. § 404.1503(c).

[32] 20 C.F.R. § 404.1503(d).

[33] 20 C.F.R. § 404.1503(3).

[34] *See* note 15 above.

[35] 42 U.S.C. § 1382c(a)(3)(B).

2. *Use of the Grid.* The agency must first determine which of the three available grids or tables[36] to use, each dealing with a different level of exertional impairment,[37] since obviously a person's employability for many jobs may well depend upon the extent to which he can stand, move, or lift. Thus, the agency determines the person's residual functional capacity to perform certain levels of work. This determination is naturally an ersatz combination of medical and vocational factors.

Finally, once the correct grid is selected, it is used. The grid contains in tabular form a series of rules which constitute the Secretary's interpretation of the statutory phrase "age, education, work experience,"[38] which are the determinants of ability to engage in substantial gainful activity *other than* the prior job which the impaired claimant can no longer perform. In essence the grid is a black box into which three variables are fed: age, education, and work experience. When the agency determines the three variables in any particular case the black box is cranked—*i.e.*, the final column on the grid [styled "decision"] is read—and the required result spouts forth: either "disabled," or "not disabled."

It is important to note that while there are of course situations in which the particular applicant's criteria simply do not fit the grid system for one reason or another the grid is not used,[39] where the grid *does* apply the agency—and, in

[36] Table 1 is for applicants able to do only sedentary work, 2 for light, and 3 for medium. The terms sedentary, light and medium are defined in 20 C.F.R. § 404.1510.

[37] An "exertional impairment" limits the strength which an applicant can exert on the job. A non-exertional impairment might be, for example, the required use of a renal dialysis machine.

[38] 42 U.S.C. § 1382c(a)(3)(B).

[39] 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(a) ("Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case . . ."). The regulation suggests as an example a person who falls in the middle by being able to do more than light but less than medium work, in which event the grid is used simply for whatever use it may be. *Id.* at § 200.00(d).

particular, the ALJ—is absolutely required to read and follow the decision in the grid column labelled "decision."

Factored into the grid system is a rule-based administrative notice of the existence of a number of available unskilled jobs in the applicable economy. When the grid is used, therefore, the existence of such jobs in the economy "is established."[40] The rule does not provide for the consideration of contrary testimony on the point, and does not provide for the possibility that an applicant might offer evidence which, in fair litigation not limited by the conclusive rule, might be deemed to have overcome the administratively-noticed facts.

3. *Validity of Grid System.* The grid system cannot rebut the *prima facie* case, since the grid's use here is invalid for two reasons.

a. *Administrative Notice Deemed Conclusive.* The grid has taken *conclusive* administrative notice of the existence of sedentary, light, and medium jobs "throughout" the national economy; under the grid "the existence of such jobs is established."[41] When the regulation states that the fact "is established," it obviously means conclusively established. Certainly it does say otherwise. Such conclusive administrative notice expressly violates 5 U.S.C. § 556(e), providing that:

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Accordingly, the regulation being contrary to an act of Congress in that respect, even if judgment should *not* be rendered in favor of plaintiff the case should be remanded to allow plaintiff—should she so desire—offer evidence pursuant to 5 U.S.C. § 556(e) that work of which she is capable does in these times of high unemployment exist "throughout" the national economy.[42]

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[40] *Id.* at § 200.00(b).

[41] 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(b).

[42] The "throughout" term is in the grid regulations, 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(b). It is not clear whether that term is intended to supplant 20 C.F.R. § 404.1509(a), but since under

b. *Administrative Notice by Rule.* Administrative or judicial notice in its traditional sense is ordinarily expressly taken at the hearing and, in fact, the Administrative Procedure Act—and arguably the Due Process Clause also—requires administrative notice to be expressly taken *at the hearing*. As the Court of Appeals for this Circuit recently wrote:

> The Administrative Procedure Act provides in § 556(c) [sic: § 556(e)]:
>
> > When an agency decision rests on official notice of material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.
>
> The provision is unquestionably applicable to disability cases that are heard before ALJs, because the statute, 42 U.S.C. § 405(b), requires disability decisions to be made "on the basis of evidence adduced at the hearing."
>
> . . . .
>
> Unfairness may result when facts are noticed without precisely indicating the facts and their source. A quick remark by an ALJ that he takes official notice of availability of jobs in the national economy that would be suitable for the claimant could be unfair for lack of sufficient specificity.[43]

The administrative notice taken here was procedurally invalid because there was not even a "quick remark" at the hearing, there was nothing said at the hearing *at all* about administrative notice which was, then, procedurally improper by reason of 5 U.S.C. § 556(e) and the "evidence adduced at the hearing" requirement of 42 U.S.C. § 405(b).

The possibility that plaintiff can submit a rebuttal affidavit *on appeal* in the Appeals Council does not change the result. The statute states that the decision must be based on evidence "adduced at the hearing"[44]—it does not say on appeal—and it is inconceivable that in passing 5 U.S.C.

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the grid the existence of jobs "throughout" the economy was noticed, that is what plaintiff is entitled to rebut.

[43] *White* v. *Harris*, 605 F.2d 867, 870 (5th Cir. 1979), *quoting* K. DAVID, ADMINISTRATIVE LAW § 15.11 (Supp. 1978).

[44] 42 U.S.C. § 405(b).

§ 556(e) Congress meant that the rebuttal evidence should be first offered on appeal.

Similarly, the right of the claimant to rebut the underlying findings of factual fact[45] (*e.g.*, age) is not the same as the opportunity to rebut the administratively-noticed fact, namely, the existence of appropriate jobs in the appropriate economy. That administratively-noticed fact is irrebuttable under the grid.

Accordingly, use of the grid does not constitute the requisite rebuttal.

VII. *Propriety of Remand.* The Social Security Disability Amendments of 1980[46] amend 42 U.S.C. § 405(g) to provide that:

> The Court ... may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.[47]

A fair reading of the statute indicates that it pertains only to remands to allow the *plaintiff* to other additional testimony; it does not say so, however. If the Court decides not to simply enter judgment in favor of plaintiff and if the statute does apply to remands to allow the Secretary to offer additional testimony, the statute does not forbid remand here because:

A. "there is new evidence which is material," namely, there should be vocational testimony, and;

B. "there is good cause for the failure to incorporate such evidence into the record in prior proceeding," namely, reliance by the ALJ upon an existing regulation.

CONCLUSION

When the ALJ found that plaintiff was unable to perform her former job, the burden shifted to the Secretary to prove her defense, namely, that plaintiff was able to do

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[45] 20 C.F.R. § 404.1513, Subpart P, App. 2, § 200.00(a).

[46] Pub.L. No. 96-265, 49 U.S.L.W. 7 (July 15, 1980).

[47] *Id.* at § 307.

other work in the economy, and that such work was available. The secretary failed to carry her burden on rebuttal because:

1. There was no vocational testimony explaining what work plaintiff could do, given her limitations;

2. No vocational evidence outside the grid was administratively noticed even assuming that such a procedure would be valid;

3. The grid cannot serve as the requisite rebuttal testimony because:

A. the regulation precluding plaintiff's adducing contrary rebuttal employment evidence at the hearing violates 5 U.S.C. § 556(e) in that it was improperly *conclusive* administrative notice, and;

B. the administrative notice taken violated 42 U.S.C. § 405(b)'s "adduced at the hearing" requirement and 5 U.S.C. § 556(e) because the ALJ did not even mention at the hearing that he was administratively noticing anything.

Accordingly, this case must be remanded to give the Secretary an opportunity to offer valid evidence contrary to plaintiff's *prima facie* case, or if none, to award benefits to plaintiff.

DONE this 21st day of November, 1980.

/s/ _____

DAVID A. BAGWELL
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 80-0638-P

THOMAS O. JONES, PLAINTIFF

v.

RICHARD SCHWEIKER, Secretary of Department of Health and Human Services, DEFENDANT.

ORDER AND JUDGMENT

After due and proper consideration, and upon the recommendation of the Magistrate, which is adopted as the opinion of this Court, it is ORDERED, ADJUDGED and DECREED that the Administrative decision be and is hereby VACATED, and that this cause be REMANDED to the Secretary of Health and Human Resources for additional proceedings not inconsistent with the opinion of this Court, no costs to be taxed.

DONE this 23d day of February, 1981.

/s/ VIRGIL PITTMAN

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND EXAMINED THIS THE
23d Day of Feb.
1981 Minute Entry
No. 52,341
William J. O'Connor, Clerk
By G. Walter
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 80-0638-P

THOMAS O. JONES, PLAINTIFF

v.

RICHARD SCHWEIKER, Secretary of Department of Health and Human Services, DEFENDANT.

RECOMMENDATION OF MAGISTRATE

Plaintiff filed suit in this Court as provided by 42 U.S.C. § 405(g) for review of an adverse decision of the Administrative Law Judge ["ALJ"] on a Social Security claim. The Court referred the case to the Magistrate for preliminary review of the administrative record[1] and recommendation.

Congress provided that in such a case the Court shall have power to enter judgment upon the pleadings and transcript, or to remand the case. 42 U.S.C. § 405(g).

I. *Procedural History.* On May 27, 1975, plaintiff filed a claim with the Social Security Administration seeking an entitlement to a "period of disability" under 42 U.S.C. § 416(i), and Social Security Disability Insurance benefits as provided by 42 U.S.C. § 423. The application was denied initially and on reconsideration by the Agency, and plaintiff thereupon sought a hearing before an ALJ. The ALJ found, in substance, that:

1. Claimant met the threshold requirements;

2. Claimant was 48 years old, had completed ten years of school, and had worked for the telephone company installing and maintaining telephones;

3. Claimant had no medically determinable physical or mental impairment which would prevent him from doing many light sedentary jobs such as work as a bench assembler in a multitude of industries;

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[1] 28 U.S.C. § 636(b)(3); *Mathews v. Weber*, 423 U.S. 261 (1976).

4. Claimant was not prevented from engaging in substantial gainful activity for any continuous period which had lasted or could be expected to last for at least twelve months;

5. Claimant was not under a "disability" as defined by the Act.

No further action was taken. On January 18, 1979, plaintiff filed a second claim with the Social Security Administration which was denied initially and on reconsideration by the Agency and plaintiff sought a hearing before an ALJ.

The ALJ held a 19-minute hearing on April 1, 1980, at which plaintiff was represented by an attorney, and denied the claim, finding in substance that:

1. Claimant met the threshold requirements;

2. Claimant was 52 years old (approaching advanced age), had a tenth grade education (a limited education), could read, write, and handle his own financial affairs;

3. Medical evidence established that claimant had suffered from an old compression fracture of the 12th thoracic vertebra, degenerative disc disease of the lumbar spine, and allergic rhinitis and sinusitis;

4. Claimant was unable to perform his former job as a telephone repairman, which was semi-skilled, but did not have transferable job skills;

5. Claimant had the residual functional capacity for light work;

6. Regulations required that claimant be found "not disabled";

7. Evidence established that claimant was not precluded from engaging in substantial gainful activity by an impairment or impairments which could be expected to result in death or which had lasted or could be expected to last for twelve months.

The Appeals Council refused the request to review the decision of the ALJ, and plaintiff thereupon sought review in this Court of the decision of the ALJ, the final administrative decision.

II. *Evidence of Record.*

A. Employment Background. Plaintiff is a 52 year old man who has been married to his second wife for twenty

years, and has two children from his first marriage. He has a tenth grade education. He worked for the telephone company installing and maintaining lines from 1947 until November of 1974, then did light jobs for the phone company until he was placed on disability retirement in November of 1975. Since retiring, he has had income from property which he sold; from an insurance policy that paid $200 a month until November of 1979; from a disability pension from the phone company that pays approximately $300 a month; and from his wife's job as a registered nurse which pays her approximately $10,000 a year.[2]

B. *Alleged Medical Problems.* Plaintiff claims that he has been disabled because of his back condition since August 2, 1974.[3]

C. *Medical Evidence.* The medical records reveal that plaintiff was examined on August 11, 1975, by Dr. M.A. Acinno, an orthopedic surgeon in Birmingham, with the chief complaints of pain in the low back and painful hips. The history taken by Dr. Acinno revealed that plaintiff's back problem began in 1965 when he was injured by falling off a telephone pole while doing his regular job as a lineman for the telephone company. He saw a chiropractor until 1973, when he went to Dr. James T. Morgan, a general surgeon in Birmingham, because of progressively worse pain. Dr. Morgan treated him with medication and in September of 1974, referred him to Dr. William Tarpley, an orthopedic surgeon in Birmingham, who advised him to continue on medication. Plaintiff told the doctor that he was tired and sore in the mornings, but after moving around, he would feel more comfortable. Dr. Acinno stated that the plaintiff could not perform his job as a lineman, *but that he could* [illegible] *work on a level floor and perform* sedentary to moderate type work that did not involve lifting. The diagnosis was osteoarthritis of the lumbar spine and degenerative disc disease.[4]

Dr. John E. Foster, a general practitioner in Foley, reported to the agency on November 20, 1975, that the plain-

[2] *Record* at 24-7.
[3] *Id.* at 99.
[4] *Id.* at 77-8.

tiff had several central disc herniations of the lumbar spine as well as hypertrophic (enlargement or overgrowth of an organ or part due to an increase in size of its constituent cells) changes. His diagnosis was vertebral body disease with disc syndrome.[5]

On January 15, 1976, Dr. Haydee Kimmich, an orthopedic surgeon in Mobile, wrote to the Disability Determination Unit that x-rays of the plaintiff's back revealed osteoarthritic and degenerative changes of the lower disc interspace between L5-S1. He stated that since there was no clear neurological deficit, there was no reason to consider surgery. Dr. Kimmich recommended that since the plaintiff could not perform his former job, he could be sent to Vocational Rehabilitation for testing and physical therapy.[6]

On a form titled "Functional Capacity Evaluation Based on 8 Hours Work Day," Dr. Kimmich indicated that in his opinion the plaintiff could perform sedentary work if it involved only 3-5 hours of sitting a day; and plaintiff could possibly perform light work if it involved only 3-5 hours of walking or standing a day and if the plaintiff could operate arm and leg controls. Dr. Kimmich indicated that the plaintiff would not be able to do moderate or heavy work.[7]

Dr. Foster wrote "To Whom It May Concern" on April 23, 1976, that the plaintiff had been in the South Baldwin Hospital from April 17 through April 23, 1976, for lumbar disc syndrome.[8]

The records from the plaintiff's April, 1976 stay at the South Baldwin Hospital indicated that he was admitted by Dr. Foster with a history of severe and constant pain in the low back area. Since the pain had not been controlled with medication at home, plaintiff was admitted for further evaluations. The examinations revealed a recurrent low

[5] *Id.* at 80, 83.
[6] *Id.* at 84.
[7] *Id.* at 85.
[8] *Id.* at 90.

back syndrome and plaintiff was treated with rest, diet, physical therapy and medication. He was discharged in an improved condition to be followed at the office.[9]

On April 11, 1979, the plaintiff was examined by Dr. H.C. George, an orthopedic surgeon in Fairhope, for evaluation of his complaint of chronic back problems. Plaintiff told Dr. George that he was rarely free of pain and that any type of activity aggravated the back ache. Dr. George diagnosed an old compression fracture at the 12th thoracic vertebra and degenerative disc disease at L3-4.[10]

Dr. George completed a Physical Capacities Evaluation form indicating that in his opinion the plaintiff could be expected to lift and/or carry twenty pounds occasionally to ten pounds frequently; stand and walk as much as six or more hours a day; and sit and work as much as six out of eight hours a day. He did not restrict the plaintiff from any of the activities listed on the form.[11]

Dr. John Gewin, an otorhinolaryngologist in Birmingham, wrote to the Disability Determination Unit on June 30, 1979, at the request of plaintiff, to state that the plaintiff had been seen in his office complaining of sinus problems. Plaintiff was found to have an allergic rhinitis (inflammation of the mucous membrane of the nose) and sinusitis (inflammation of the sinus) and was treated with medication.[12]

On July 3, 1979, Dr. Foster reported to the agency that he had last seen plaintiff on May 7, 1979, with a severe backache. His diagnosis was disc syndrome, vertebral body disease and low back syndrome. Dr. Foster stated that plaintiff had several central disc herniations of the lumbar spine as well as hypertrophic changes, and he recommended total disability.[13]

Dr. Preston Daugherty, an orthopedic surgeon in Mobile, wrote to the Disability Determination Unit on August 21, 1979, with the results of his examination of the plain-

[9] *Id.* at 132, 141.
[10] *Id.* at 142.
[11] *Id.* at 143.
[12] *Id.* at 144.
[13] *Id.* at 145, 148.

tif. Dr. Daugherty stated that based on his physical findings, he could not substantiate the severity of plaintiff's complaints. He said that plaintiff did have some degenerative changes present in the L5-S1 intervertebral disc space but that he could not verify by physical findings whether there was a herniated disc.[14]

Dr. Daugherty completed a Physical Capacities Evaluation form indicating that in his opinion the plaintiff could be expected to lift and/or carry twenty pounds occasionally to ten pounds frequently; stand and walk six or more hours in a day; and sit and work as much as six out of eight hours a day. He restricted the plaintiff from working around hazardous machinery and from being in places with environmental problems.[15]

D. *Plaintiff's Testimony.* Plaintiff testified that his biggest problem is his back but that he also has sinus trouble and "a lot of little things" such as arthritis. The doctors have told him that it will get worse instead of better and that he will have to learn to live with it. Plaintiff said that in a normal day he will try to do odd jobs around the house and yard. He said that he tries not to lift ten to twenty pounds on a regular basis because if he does lift anything heavy, his back will begin to hurt and he will have to lie down flat and relax for about a day before he can move around again. He can sit if he's in a comfortable position, but if it's less-than-comfortable he will be in a lot of pain. Some of the medicines he takes are narcotics and affect the way he functions. Plaintiff said that he was contacted one time by Vocational Rehabilitation but they told him that if the phone company didn't have a job for him, then it was doubtful that Vocational Rehabilitation had anything he could do. To receive disability payments from the phone company, he has to have a check-up every three months and if the check-ups showed him to be capable of returning to work, the payments would cease and he would be required to return to work. He has been going to Dr. Foster

[14] *Id.* at 149-50.
[15] *Id.* at 151.

for these check-ups for the last five years and Dr. Foster has not removed him from disability.[16]

III. *Applicable Law in General.* The Social Security Act: sets forth a two-part test for determining "disability" under the Act: First, there must be a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. . . ." 42 U.S.C. § 1382c(a)(3)(A). Second, this impairment must be so severe, that the claimant is "not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." Id. § 1382c(a)(3)(B).[17]

If plaintiff shows that he cannot now perform his former job, the burden shifts to the Secretary to show that the claimant is able to perform other gainful work available in the applicable economy.[18] The Secretary's burden is normally carried either by the testimony of a vocational expert[19] or perhaps by administrative notice[20] if properly taken.[21]

IV. *Standard of Review.* Congress has clearly provided that in a Social Security case the administrative findings "as to any fact, if supported by substantial evidence, shall be conclusive. . . ."[22] This Court's function is strictly limited;

[16] *Id.* at 26, 28-32.

[17] *Chaney v. Califano*, 588 F.2d 958, 959 (5th Cir. 1979).

[18] *McGill v. Harris*, 615 F.2d 365 (5th Cir. 1980); *Johnson v. Harris*, 612 F.2d 993 (5th Cir. 1980); *White v. Harris*, 605 F.2d 867, 869 (5th Cir. 1979); *Knott v. Califano*, 559 F.2d 279, 280 (5th Cir. 1977).

[19] *E.g., Chaney v. Califano*, 588 F.2d 958, 960 (5th Cir. 1979).

[20] *Brown v. Finch*, 429 F.2d 80, 82 (5th Cir. 1970); *Breaux v. Finch*, 421 F.2d 687, 689 (5th Cir. 1970).

[21] *White v. Harris*, 605 F.2d 867, 870 (5th Cir. 1979).

[22] 42 U.S.C. § 405 (g).

we may only determine whether the administrative findings are supported by "substantial evidence" considering the record as a whole.[23]

The term "substantial evidence" in this circumstance means:

> more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[24]

The test is undoubtedly quite strict. Though it may be "so stringent that is has been described as bordering on the unrealistic,"[25] it is nevertheless true that "the claimant's burden of proof is not insuperable."[26]

V. *Analysis.* Since the ALJ found that plaintiff was no longer able to perform his former employment the burden fell to the Secretary to rebut plaintiff's *prima facie* case.[27] In sum, the burden rested upon the Secretary to introduce evidence that plaintiff could perform gainful work.

According to the testimony of Drs. George and Daugherty,[28] the testimony most favorable to the Secretary, plaintiff was able to lift and/or carry twenty pounds occasionally to ten pounds frequently; stand and walk six or more hours in a day; and sit and work six out of eight hours a day. That testimony, however, does not bridge the gap to an actual job. There is not one drop of testimony in the record about what kind of *job* someone with that medical capacity can do. For example, no vocational expert testified that a person with that medical capacity could take up money at a parking lot for the period of a normal shift.

The Secretary's *only* rebuttal evidence on that point was attempted administrative notice under the grid. As dis-

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[23] *Chaney v. Califano*, 588 F.2d 958, 959 (5th Cir. 1979); *Mims v. Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978); *Rivas v. Weinberger*, 576 F.2d 255 (5th Cir. 1973).

[24] *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

[25] *Johnson v. Harris*, 612 F.2d 993 (5th Cir. 1980, *quoting Williams v. Finch*, 440 F.2d 612, 615 (5th Cir. 1971).

[26] *Simmons v. Harris*, 602 F.2d 1233, 1236 (5th Cir. 1979), *quoting Mims v. Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978).

[27] See note 18 above.

[28] See text at notes 10 and 15 above.

cussed in the next section, the grid does not suffice to rebut the *prima facie* case.

VI. *Medical-Vocational Guidelines* ["*The Grid*"]. The resolution of this case is inextricably interwoven with the applicability and validity of the new "Medical-Vocational Guidelines"[29] or, more commonly, "the grid" and its attendant explanatory regulations. Since the vocational conclusion of the ALJ is at bottom based in important part upon the grid, the decision of the ALJ is supported by substantial evidence *only* if the grid is to be applied, if it was properly applied, and if the grid establishes a system of adjudication not at variance with the statutes, Constitution, or decisional laws of the United States.

A. *The Medical-Vocational Guidelines* ["*The Grid*"]. In the middle 1970's the Social Security Administration began[30] an internal study of the possibility of adoption of regulations providing increased use of administrative presumptions and administrative notice, having a view toward both administrative efficiency and nationwide uniformity in Social Security Disability determinations. The new regulations became effective on February 26, 1979.[31] Because parts are displayable as a simple chart or table, the Medical-Vocational Guidelines are commonly called "the grid," a usage which, though technically limited to the tables themselves, commonly includes the attendant explanatory matter.

1. *The Grid in Perspective: Pre-Grid Analysis.* There is a sequential analysis by which the agency determination reaches the level at which the grid is used, the entire process moving toward a determination of whether or not an applicant is "disabled" within the meaning of 42 U.S.C. § 1382 c(3). Several preliminary steps are involved.

The several steps are, in sum, these:

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[29] 20 C.F.R. § 404.1513 Subpart P, App. 2, § 200.00 *et seq.*

[30] The work was apparently at the prodding of certain congressional committees and the General Accounting Office. Since no statute was passed, however, the work should be treated as a pure executive branch effort.

[31] The hearing in this case occurred 14 months later, on April 1, 1980.

First, the agency determines whether the person is actually working.[32] If so, the agency conclusively presumes that the applicant is not disabled and the claim must be denied;[33] but if not, the agency moves to the second step.

Second, the agency must determine whether the claimed impairment is "severe."[34] If not, the claim is denied on medical evidence alone; but if so, the agency moves to the third step.

Third, the agency determines whether the applicant's impairment equals or exceeds in severity a list of impairments.[35] If so, the applicant is entitled to benefits, but if not, the agency goes on to the fourth step.

Fourth, the agency determines whether the applicant is able to perform his or her past work.[36] If so, the agency finds that the applicant is not disabled under the law, but if not, the agency moves to the fifth step. At this point the burden shifts to the Secretary.[37]

Fifth, and last, the agency must determine whether the applicant is able—despite his or her inability to perform his or her prior work—to perform other substantial gainful activity considering his or her age, education, and work experience.[38] It must be continually recalled that by this point the burden has already shifted to the Secretary to rebut plaintiff's *prima facie* case. The grid system is designed to constitute the Secretary's rebuttal to the claimant's *prima facie* case, and the entire rebuttal is in form of administratively-noticed facts systematized in the grid. We proceed next to a summary analysis of the use of the grid.

[32] 20 C.F.R. § 404.1503(b).

[33] By comparison, judge-made law in other areas recognizes that a person, though injured, is often "required to work in order to survive." *Vaughn v. Atkinson*, 369 U.S. 527 533 (1962) (maintenance and cure under general maritime law).

[34] 20 C.F.R. § 404.1503(c).

[35] 20 C.F.R. § 404.1503(d).

[36] 20 C.F.R. § 404.1503(3).

[37] See note 18 above.

[38] 42 U.S.C. § 1382c(a)(3)(B).

2. *Use of the Grid.* The agency must first determine which of the three available grids or tables[39] to use, each dealing with a different level of exertional impairment,[40] since obviously a person's employability for many jobs may well depend upon the extent to which he can stand, move, or lift. Thus, the agency determines the person's residual functional capacity to perform certain levels of work. This determination is naturally an ersatz combination of medical and vocational factors.

Finally, once the correct grid is selected, it is used. The grid contains in tabular form a series of rules which constitute the Secretary's interpretation of the statutory phrase "age, education, work experience,"[41] which are the determinants of ability to engage in substantial gainful activity *other than* the prior job which the impaired claimant can no longer perform. In essence the grid is a black box into which three variables are fed: age, education, and work experience. When the agency determines the three variables in any particular case the black box is cranked—*i.e.*, the final column on the grid [styled "decision"] is read—and the required result spouts forth: either "disabled," or "not disabled."

It is important to note that there are of course situations in which the particular applicant's criteria simply do not fit the grid system for one reason or another and the grid is not used.[42] Where the grid does apply the agency—and, in

[39] Table 1 is for applicants able to do only sedentary work, 2 for light, and 3 for medium. The terms sedentary, light and medium are defined in 20 C.F.R. § 404.1510.

[40] An "exertional impairment" limits the strength which an applicant can exert on the job. A non-exertional impairment might be, for example, the required use of a renal dialysis machine.

[41] 42 U.S.C. § 1382c(a)(3)(B).

[42] 20 C.F.R. § 404.1513 Subpart P, App.2 § 200.00(a) ("Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case . . ."). The regulation suggests as an example a person who falls in the middle by being able to do more than light but less than medium work, in which event the grid is used simply for whatever use it may be. *Id.* at § 200.00(d).

particular, the ALJ—is absolutely required to read and follow the decision in the grid column labelled "decision."

Factored into the grid system is a rule-based administrative notice of the ability of people with certain attributes to perform certain jobs in the applicable economy. When the grid is used, therefore, whatever it says "is established."[43] The rule does not provide for the consideration of contrary testimony on the point, and does not provide for the possibility that an applicant might offer evidence which, in fair litigation not limited by the conclusive rule, might be deemed to have overcome the administratively-noticed facts.

3. *Validity of Grid System.* The grid system cannot provide administratively-noticed vocational testimony to rebut the *prima facie* case, since the grid's use here is invalid for two reasons.

a. *Administrative Notice Deemed Conclusive.* The grid has taken *conclusive* administrative notice that a person with plaintiff's attributes is able to perform certain available jobs. Such conclusive administrative notice expressly violates 5 U.S.C. § 556(e), providing that:

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Accordingly, the regulation being contrary to an act of Congress in that respect, even if judgment should *not* be rendered in favor of plaintiff the case should be remanded to allow plaintiff to offer testimony contrary to the facts administratively noticed and to allow the ALJ to make a factual finding unhindered by a conclusive presumption.

b. *Administrative Notice by Rule.* Administrative or judicial notice in its traditional sense is ordinarily expressly taken at the hearing and, in fact, the Administrative Procedure Act—and arguably the Due Process Clause also—requires administrative notice to be expressly taken *at the hearing.* As the Court of Appeals for this Circuit recently wrote:

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[43] *Id.* at § 200.00(b).

> The Administrative Procedure Act provides in § 556(c) [sic: § 556(e)]:
>
> > When an agency decision rests on official notice of material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.
>
> The provision is unquestionably applicable to disability cases that are heard before ALJs, because the statute, 42 U.S.C. § 405(b), requires disability decisions to be made "on the basis of evidence adduced at the hearing."
>
> . . . .
>
> Unfairness may result when facts are noticed without precisely indicating the facts and their source. A quick remark by an ALJ that he takes official notice of availability of jobs in the national economy that would be suitable for the claimant could be unfair for lack of sufficient specificity.[44]

The administrative notice taken here was procedurally invalid because there was not even a "quick remark" at the hearing, there was nothing said at the hearing *at all* about administrative notice which was, then, procedurally improper by reason of 5 U.S.C. § 556(e) and the "evidence adduced at the hearing" requirement of 42 U.S.C. § 405(b).

The possibility that plaintiff can submit a rebuttal affidavit *on appeal* in the Appeals Council does not change the result. The statute states that the decision must be based on evidence "adduced at the hearing"[45]—it does not say on appeal—and it is inconceivable that in passing 5 U.S.C. § 556(e) Congress meant that the rebuttal evidence should be first offered on appeal.

Similarly, the right of the claimant to rebut the underlying findings of actual fact[46] (*e.g.*, age) is not the same as the opportunity to rebut the administratively-noticed ultimate fact, namely, the vocational ability of plaintiff to per-

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[44] *White v. Harris*, 605 F.2d 867, 870 (5th Cir. 1979), *quoting* K. DAVIS, ADMINISTRATIVE LAW § 15.11 (Supp. 1978). *Accord*, *Fruge v. Harris*, ___ F.2d ___ (5th Cir. Dec. 4, 1980) (No. 80-3476).

[45] 42 U.S.C. § 405(b).

[46] 20 C.F.R. § 404.1513, Subpart P, App. 2, § 200.00(a).

form certain jobs. That administratively-noticed ultimate fact is *irrebuttable* under the grid.

Accordingly, use of the grid does not constitute the requisite rebuttal.

VII. *Propriety of Remand.* The Social Security Disability Amendments of 1980[47] amend 42 U.S.C. § 405(g) to provide that:

> The Court ... may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.[48]

A fair reading of the statute indicates that it pertains only to remands to allow the *plaintiff* to offer additional testimony; it does not say so, however. If the Court decides not to simply enter judgment in favor of plaintiff and if the statute does apply to remands to allow the Secretary to offer additional testimony, the statute does not forbid remand here because:

A. "there is new evidence which is material," namely, there should be vocational testimony, and;

B. "there is good cause for the failure to incorporate such evidence into the record in prior proceeding," namely, reliance by the ALJ upon an existing regulation.

CONCLUSION

When the ALJ found that plaintiff was unable to perform his former job, the burden shifted to the Secretary to prove his defense, namely, that plaintiff was able to do *other* work in the economy. The Secretary failed to carry his burden on rebuttal because:

1. There was no *vocational* testimony explaining what type work plaintiff could do, given his limitations;

2. No vocational evidence outside the grid was administratively noticed even assuming that such a procedure would be valid;

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[47] Pub. L. No. 96-265, 49 U.S.L.W. 7 (July 15, 1980).

[48] *Id.* at § 307.

3. The grid cannot serve as the requisite rebuttal testimony because:

A. the regulation precluding plaintiff's adducing contrary rebuttal employment evidence at the hearing violates 5 U.S.C. § 556(e) in that it was improperly *conclusive* administrative notice, and;

B. the administrative notice taken violated 42 U.S.C. § 405(b)'s "adduced at the hearing" requirement and 5 U.S.C. § 556(e) because the ALJ did not even mention at the hearing that he was administratively noticing anything.

Accordingly, this case must be remanded to give the Secretary an opportunity to offer valid evidence contrary to plaintiff's *prima facie* case, or if none, to award benefits to plaintiff.

DONE this 26th day of January, 1981.

/s/ _____

DAVID A. BAGWELL
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No: 80-0651-H

FRED SOESBE, PLAINTIFF

v.

RICHARD SCHWEIKER, Secretary of Department of Health and Human Services, DEFENDANT.

ORDER AND JUDGMENT

After due and proper consideration, and upon the recommendation of the Magistrate, which is adopted as the opinion of this Court, it is ORDERED, ADJUDGED and DECREED that the Administrative determination be and is hereby VACATED and REVERSED, that judgment be and is hereby ENTERED in favor of Plaintiff, that this cause be REMANDED to the Secretary of Health and Human Resources for Administrative action in conformity with this judgment.

DONE this 24th day of March, 1981.

/s/ W. B. HAND

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND EXAMINED THIS THE
24th Day of March
1981 Minute Entry
No. 52,476
William J. O'Connor, Clerk
By G. Walter
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 80-0651-H

FRED SOESBY, PLAINTIFF

v.

RICHARD SCHWEIKER, Secretary of Department of Health and Human Services, DEFENDANT.

RECOMMENDATION OF MAGISTRATE

Plaintiff filed suit in this court as provided by 42 U.S.C. § 405(g) for review of an adverse decision of the Administrative Law Judge ["ALJ"] on a Social Security claim. The Court referred the case to the Magistrate for preliminary review of the administrative record[1] and recommendation.

Congress provided that in such a case the Court shall have power to enter judgment upon the pleadings and transcript, or to remand the case. 42 U.S.C. § 405(g).

I. *Procedural History.* On August 1, 1977, plaintiff filed a claim with the Social Security Administration seeking an entitlement to a "period of disability" under 42 U.S.C. § 416(i) and Social Security Disability insurance benefits as provided by 42 U.S.C. § 423. The applications were denied initially and on reconsideration. A hearing before an ALJ was requested and scheduled but both plaintiff and his attorney failed to appear at the hearing. The ALJ found that the plaintiff did not show good cause for failure to appear at the hearing and dismissed the request for the hearing. The Appeals Council affirmed the decision of the ALJ and no further action was taken.

On February 8, 1979, plaintiff filed a second set of applications which were denied initially and on reconsideration. On March 17, 1980, plaintiff filed an application for Supplemental Security Income pursuant to 42 U.S.C.

[1] 28 U.S.C. § 636(b)(3); *Mathews v. Weber*, 423 U.S. 261 (1976).

§ 1381-1383(c) and it was denied initially and on reconsideration.

On April 24, 1980, the ALJ held a 68 minute hearing at which the plaintiff was represented by an attorney, and the plaintiff, two witnesses and a vocational expert testified. The ALJ denied the claim, finding in substance that:

1. Claimant met the threshold requirements;
2. Claimant had the following impairments:
   a. hypertension that caused numbness, pain in the left shoulder, neck, arm and hand, and
   b. visual disturbances;
3. Claimant's allegation of severe disabling pain and discomfort due to his alleged impairments was not credible;
4. Claimant's impairments did not prevent him from performing work which did not require heavy lifting;
5. Claimant was unable to perform his past relevant work as maintenance and automobile mechanic which was moderate to heavy;
6. Claimant had the residual functional capacity for sedentary work;
7. Claimant was 52 years old which was defined as closely approaching advanced age;
8. Claimant had a limited education (eleventh grade);
9. Claimant's work as a mechanic imparted skills which were transferable to work other than that previously performed;
10. Regulations directed that the claimant, considering his maximum sustained work capability, age, education and work experience, be found "not disabled";
11. Claimant was not under a "disability" as defined by the Act.

The Appeals Council refused the request to review the decision of the ALJ and plaintiff thereupon sought review in this Court of the decision of the ALJ, the final administrative decision.

II. *Evidence of Record.*

A. *Employment Background.* Plaintiff is a 53-year old married man with an eleventh grade education. He worked as a maintenance mechanic in the textile industry from 1961 until 1977 and, prior to that, from 1948 until 1961, he

worked as an auto mechanic. He receives $100 a month from an insurance policy, his wife receives a small amount of money from baby sitting, and they receive food stamps.[2]

B. *Alleged Medical Problems.* Plaintiff claims that he became disabled on June 24, 1977, because of hypertension which causes visual disturbances, urinary complications, loss of equilibrium, dizziness and fainting.[3]

C. *Medical Evidence.* The medical records reveal that plaintiff was admitted to the Baptist Hospital in Pensacola on July 22, 1975, by Dr. F. D. Kimbell, a neurologist. Plaintiff was admitted because of numbness on the left side of his body, trouble with the use of the left side of his body, and pain in his left neck, shoulder and arm. Plaintiff also complained of numbness and weakness in his left hand which affected his writing (plaintiff is left-handed). Plaintiff stated that three months earlier he had been doing some heavy lifting at work when he felt something pull in the back of his neck and shoulder. He was treated for this by Dr. Marvin Taylor, a general surgeon in Foley. Dr. Kimbell noted that he had previously seen the plaintiff in 1972 with left-sided visual scotomata (an area of depressed vision within the visual field surrounded by an area of normal vision) and left sided numbness associated with hypertension. On examination, plaintiff's chest x-ray, c-spine and myelogram were all within normal limits. He was treated conservatively with traction, physiotherapy, deep heat therapy and analgesics with rather striking improvements of symptoms. Plaintiff was discharged on July 26, 1975, with the diagnoses of cervical myositis (inflammation of a voluntary muscle of the neck), chronic hypertension and vascular migraine disorder.[4]

Dr. Kimbell saw the plaintiff on August 1, 1975, with episodes of visual blurring, and recommended that plaintiff have his eyes and glasses checked. Plaintiff was seen again on August 26, 1975, with complaints of severe pain in the left neck, shoulder and arm which radiated into his left hand. Plaintiff stated that he had gone back to work but

[2] *Record* at 26-8, 177.
[3] *Id.* at 156.
[4] *Id.* at 114-15.

simply could not handle the work because he had to write and had significant responsibility. Dr. Taylor was treating him for high blood pressure and Dr. Kimbell did not think surgical treatment was necessary. On the plaintiff's request, Dr. Kimbell prescribed cervical traction for home use.[5]

On September 5, 1975, Dr. John Axley, a neurologist in Pensacola who had seen the plaintiff on a referral from Dr. Kimbell, wrote that his impressions were cervical arthritis, cervical neuralgia (paroxysmal pain which extends along the course of one or more nerves), pain in the left neck and shoulder secondary to the arthritis and with apparent weakness relating to the neuralgia, tingling of the left third and fourth fingers, significant hypertension, and possibly early left hemiplegia (paralysis of one side of the body).[6]

Plaintiff was admitted to the South Baldwin Hospital in Foley by Dr. Taylor on February 5, 1977, with complaints of intermittent episodes of sharp left groin and left lower quadrant abdominal pain. Plaintiff also complained of nausea, hematuria (blood in the urine), and slight dysuria (painful or difficult urination). Dr. Taylor stated that plaintiff's condition was complicated by his history of hypertension. Examination revealed left renal lithiasis (kidney stone) with spontaneous expulsion. Plaintiff was treated with diet, rest, observation and medication and was discharged on February 14, 1977.[7]

On July 13, 1977, Dr. Taylor wrote that the plaintiff was "unable to work—severe hypertension and cervical neuralgia."[8]

Dr. C.R. Barksdale, an internist in Fairhope, reported to the Disability Determination Unit that he had examined the plaintiff on November 3, 1977, with complaints of loss of vision and dizziness. Plaintiff stated that his problems are worse with stress or strain and that he had had no problems since he stopped working. Dr. Barksdale stated that plaintiff had a major problem with high blood pressure

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[5] *Id.* at 110-11.
[6] *Id.* at 106-07.
[7] *Id.* at 125, 132.
[8] *Id.* at 142.

for which he has been on medication for five years. Dr. Barksdale summarized that plaintiff had some neurologic symptomatology which seemed to be a type of migraine situation and that he had chronic myositis which was compatible with the changes on his cervical spine x-rays. Dr. Barksdale stated that he did not find any joint or back impairments or genito-urinary impairments.[9]

On April 11, 1978, plaintiff was admitted to the South Baldwin Hospital with a history of shortness of breath and left anterior chest pain. An immediate examination in the emergency room indicated hypertension. Plaintiff also complained of pain in the left arm and left side of the neck. Following examination and evaluation, Dr. Taylor diagnosed hypertensive cardiovascular disease with angina pectoris and stated that plaintiff's condition was complicated by dyspepsia (impairment of the power or function of digestion, usually applied to epigastric discomfort following meals). Plaintiff was treated with rest, diet and medication and was discharged on April 14, 1978.[10]

Plaintiff was admitted to the South Baldwin Hospital on August 8, 1978, with a history of sudden onset of severe pain of the left flank radiating to the scrotum and accompanied by nausea. Diagnosis was left renal lithiasis which was expelled spontaneously. Plaintiff was discharged on August 9, 1978, with instructions for a low salt diet.[11]

On October 8, 1978, plaintiff was again admitted to the South Baldwin Hospital with a diagnosis of renal lithiasis and two small stones were expelled several hours after admission. Dr. Taylor stated that plaintiff's condition was complicated by hypertensive cardiovascular disease. Plaintiff was discharged on October 9, 1978.[12]

On May 14, 1979, plaintiff was examined by Dr. Gordon Spafford, a family practitioner in Mobile, at the request of the Disability Determination Unit. Dr. Spafford reported that the plaintiff's chief complaint was pain located in the left chest area radiating into the left arm, which he said

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[9] *Id.* at 133-34.
[10] *Id.* at 207, 209.
[11] *Id.* at 218, 222.
[12] *Id.* at 224-25.

was difficult to evaluate because he could find no objective abnormalities. Dr. Spafford stated that the plaintiff's blood pressure was slightly elevated and that plaintiff had a long history of hypertension. Plaintiff told Dr. Spafford that his other problems were episodes of dizziness, some urinary incontinence, impotence, and arthritis in the right knee.[13]

Dr. Spafford completed a "Physical Capacities Evaluation" form indicating that in his opinion plaintiff could be expected to lift and/or carry twenty pounds occasionally to ten pounds frequently; stand and walk six or more hours in a normal work day; and sit and work as much as six out of eight hours a day. Dr. Spafford restricted the plaintiff from pushing and pulling movements, climbing and balancing, operating motor vehicles and working with or around hazardous machinery because of recurrent episodes of vertigo.[14]

Dr. Barksdale wrote to the Disability Determination Unit that he examined the plaintiff on February 8, 1980, with multiple complaints. Plaintiff stated that his main problem was that his left arm was numb and became painful when he tried to use it. He also has problems with his left leg. Plaintiff said that the use of a neck brace had relieved a great deal of the problem but that he had never been given a reason for the numbness in his leg and arm. Plaintiff said he had shortness of breath on exertion and stated that he had passed out twice in the past, usually preceded by dizzy spells. Plaintiff said that he had been told that he had high blood pressure for which he was on medication. Dr. Barksdale summarized that plaintiff had rather severe hypertension, but that he could find no evidence of peripheral vascular disease, no documented pulmonary impairment, and no significant neurological findings. Dr. Barksdale stated that plaintiff had very little disease that could be documented with the exception of the cervical spine disease which he had documented in 1977, and which continued to be plaintiff's main problem as a cause of his symptomology.[15]

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[13] *Id.* at 230-33.

[14] *Id.* at 234.

[15] *Id.* at 242-3.

Dr. Barksdale completed a "Physical Capacities Evaluation" form indicating that in his opinion plaintiff could be expected to lift and/or carry ten pounds or less frequently; stand and walk six or more hours in a normal work day; and sit and work as much as six out of eight hours a day. Dr. Barksdale restricted the plaintiff from climbing and balancing because of severe hypertension.[16]

D. *Plaintiff's Testimony.* Plaintiff testified that he started having problems with his left hand and arm in 1975, and that his condition has gotten worse since then. He has lost much of the use his left hand and, without medication, he has constant pain. Plaintiff can do some walking (maybe a hundred yards or so) before he gets out of breath. Sitting does not generally bother him but he does tire easily. Sometimes when he stands, he gets numbness in his legs. He has chest pain five out of seven days for which he takes nitroglycerin when the pain is severe. Plaintiff has problems with shortness of breath and wheezing at night and has "spells" which occur mostly in the daytime. When he has a spell, he has nausea, dizziness, and loss of vision in the left eye and "can't tell whether he is up or down." The spells usually begin when he exerts himself or is under a strain. If he tried to mow the lawn, that would probably bring on a spell. He has different degrees of spells and when he has a bad one, he goes to the emergency room at the hospital or to the doctor's ofice where he gets a shot and rests until he feels better. In a normal day, plaintiff said that he sits around the house and tries to breathe. Fishing was his only hobby but he hasn't fished in two years because of the pain in his arm, shoulder neck and chest. When he quit working in 1977, it was because his doctor told him he should not try to work anymore.[17]

E. *Witnesses.*

1. Diann Soesbe Cain, the plaintiff's daughter and a registered nurse, testified that since 1977 her father's symptoms have progressed in that he has more blurred vision, dizziness, loss of equilibrium, and shortness of breath. His

[16] *Id.* at 247.

[17] *Id.* at 29-30, 34-9, 45-6.

complaints of pain in the shoulder and arm have increased since 1977. Her father cannot sleep at night and can walk only a short period of time before getting shortness of breath and dizziness.[18]

2. Eva Soesbe, the plaintiff's wife, testified that her husband's condition has gotten worse since July of 1977, and that the doctor cannot get her husband's blood pressure under control. She said the doctor has told her that her husband could have a heart attack at any time and that she should stay with him at all times.[19]

3. Roger C. DuMars, a professor of rehabilitation counseling at the University of South Alabama, testified as the vocational expert. He stated that the plaintiff's former jobs involved skilled labor and were moderate with respect to exertional requirements. He listed the plaintiff's transferable job skills as the use of a wide variety of hand tools, ability to keep records and make bills, ability to read blue prints, ability to supervise others, and ability to understand and use testing equipment.[20]

III. *Applicable Law in General.* The Social Security Act: sets forth a two-part test for determining "disability under the Act: First, there must be a "medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. . . ." 42 U.S.C. § 1382c(a)(3)(A). Second, this impairment must be so severe, that the claimant is "not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."*Id.* § 1382c(a)(3)(B).[21]

If plaintiff shows that he cannot now perform his former job, the burden shifts to the Secretary to show that the claimant is able to perform other gainful work available in

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[18] *Id.* at 50-2.

[19] *Id.* at 55-6.

[20] *Id.* at 66-7.

[21] *Chaney v. Califano*, 588 F.2d 958, 959 (5th Cir. 1979).

the applicable economy.[22] The availability of work is normally proven either by the testimony of a vocational expert[23] or perhaps by administrative notice[24] if properly taken,[25] but there cannot be judicial notice of the physical capacity of plaintiff or of his vocational future *in the light of* the physical capacity.

IV. *Standard of Review.* Congress has clearly provided that in a Social Security case the administrative findings "as to any fact, if supported by substantial evidence, shall be conclusive. . . ."[26] This Court's function is strictly limited; we may only determine whether the administrative findings are supported by "substantial evidence" considering the record as a whole.[27]

The term "substantial evidence" in this circumstance means:

> more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[28]

The test is undoubtedly quite strict. Though it may be "so stringent that it has been described as bordering on the unrealistic,"[29] it is nevertheless true that "the claimant's burden of proof is not insuperable.[30]

V. *Analysis.* Since the ALJ found that plaintiff was no longer able to perform his former employment, the burden

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[22] *McGill v. Harris*, 615 F.2d 365 (5th Cir. 1980); *Johnson, v. Harris*, 612 F.2d 993 (5th Cir. 1980); *White v. Harris*, 605 F.2d 867, 869 (5th Cir. 1979); *Knott v. Califano*, 559 F.2d 279, 280 (5th Cir. 1977).

[23] *E.g., Chaney v. Califano*, 588 F.2d 958, 960 (5th Cir. 1979).

[24] *Brown v. Finch*, 429 F.2d 80, 82 (5th Cir. 1970); *Breaux v. Finch*, 421 F.2d 687, 689 (5th Cir. 1970).

[25] *White v. Harris*, 605 F.2d 867, 870 (5th Cir. 1979).

[26] 42 U.S.C. § 405(g).

[27] *Chaney v. Califano*, 558 F.2d 958, 959 (5th Cir. 1979); *Mims v. Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978); *Rivas v. Weinberger*, 576 F.2d 255 (5th Cir. 1973).

[28] *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

[29] *Johnson v. Harris*, 612 F.2d 993 (5th Cir. 1980), *quoting Williams v. Finch*, 440 F.2d 612, 615 (5th Cir. 1971).

[30] *Simmons v. Harris*, 602 F.2d 1233, 1236 (5th Cir. 1979), *quoting Mims v. Califano*, 581 F.2d 1211, 1213 (5th Cir. 1978).

fell to the Secretary to rebut plaintiff's *prima facie* case.[31] In sum, the burden rested upon the Secretary to introduce evidence that plaintiff could perform other gainful work.

When the burden shifted to the Secretary, the *only* evidence of the vocational possibilities for plaintiff came from the Medical-Vocational Guidelines, or the grid.

There was medical testimony that plaintiff was able to stand for a certain length of time and lift certain weights from time to time. The crucial problem, though, is the vocational *nexus* linking that medical finding to a *job*. For example, no person testified that a man with plaintiff's *physical abilities* and *transferable skills* would be vocationally capable of working as a cigar wrapper, oyster opener, or soft drink bottle roach inspector.

It is quite clear that the ALJ relied solely upon "the grid" [discussed later] to present that vocational nexus. Though a vocational expert testified on a limited topic, the ALJ specifically noted that the vocational expert "did not testify that claimant could do any job,"[32] and further made clear that it was the *grid*—not the vocational expert's testimony—which was viewed as providing the nexus[33] linking plaintiff's medical condition to the ability to perform an actual job.

The only question, then, is whether the *grid alone* can properly supply the nexus evidence which the *Secretary* is required to adduce, showing that plaintiff (with certain medical problems) can still perform *some actual job* in the economy.

We next proceed to that question.

VI. *Medical Vocational Guidelines* ["*The Grid*"]. The resolution of this case is inextricably interwoven with the applicability and validity of the new "Medical-Vocational Guidelines"[34] or, more commonly, "the grid" and its attendant explanatory regulations. Since the vocational conclusion of the ALJ is at bottom based solely upon the grid, the decision of the ALJ is supported by substantial evidence *only*

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[31] See note 22 above.

[32] *Record* at 67.

[33] *Id.* at 69.

[34] 20 C.F.R. § 404.1513 Subpart P, App. 2, § 200.00 *et seq.*

if the grid is to be applied, if it was properly applied, and if the grid establishes a system of adjudication not at variance with the statutes, Constitution, or decisional laws of the United States.

A. *The Medical-Vocational Guidelines* ["*The Grid*"]. In the mid 1970's the Social Security Administration began[35] an internal study of the possibility of adoption of regulations providing increased use of administrative presumptions and administrative notice, having a view toward both administrative efficiency and nationwide uniformity in Social Security Disability determinations. The new regulations became effective on February 26, 1979.[36] Because parts are displayable as a simple chart or table, the Medical-Vocational Guidelines are commonly called "the grid," a usage which, though technically limited to the tables themselves, commonly includes the attendant explanatory matter.

1. *The Grid in Perspective: Pre-Grid Analysis.* There is a sequential analysis by which the agency determination reaches the level at which the grid is used, the entire process moving toward a determination of whether or not an applicant is "disabled" within the meaning of 42 U.S.C. § 1382c(3). Several preliminary steps are involved.

The several steps are, in sum, these:

First, the agency determines whether the person is actually working.[37] If so, the agency conclusively presumes that the applicant is not disabled and the claim must be denied;[38] but if not, the agency moves to the second step.

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[35] The work was apparently at the prodding of certain congressional committees and the General Accounting Office. Since no statute was passed, however, the work should be treated as a pure executive branch effort.

[36] The hearing in his case occurred thirteen months later, on April 24, 1980.

[37] 20 C.F.R. § 404.1503(b).

[38] By comparison, judge-made law in other areas recognizes that a person, though injured, is often "required to work in order to survive." *Vaughn v. Atkinson*, 369 U.S. 527 533 (1962) (maintenance and cure under general maritime law).

Second, the agency must determine whether the claimed impairment is "severe."[39] If not, the claim is denied on medical evidence alone; but if so, the agency moves to the third step.

Third, the agency determines whether the applicant's impairment equals or exceeds in severity a list of impairments.[40] If so, the applicant is entitled to benefits, but if not, the agency goes on to the fourth step.

Fourth, the agency determines whether the applicant is able to perform his or her past work.[41] If so, the agency finds that the applicant is not disabled under the law, but if not, the agency moves to the fifth step. At this point the burden shifts to the Secretary.[42]

Fifth, and last, the agency must determine whether the applicant is able—despite his or her inability to perform his or her prior work—to perform other substantial gainful activity considering his or her age, education, and work experience.[43] It must be continually recalled that by this point the burden has already shifted to the Secretary to rebut plaintiff's *prima facie* case. The grid system is designed to constitute the Secretary's rebuttal to the claimant's *prima facie* case, and the entire rebuttal is in the form of administratively-noticed facts systematized in the grid. We proceed next to a summary analysis of the use of the grid.

2. *Use of the Grid.* The agency must first determine which of the three available grids or tables[44] to use, each dealing with a different level of exertional impairment,[45] since obviously a person's employability for many jobs may well depend upon the extent to which he can stand, move, or lift. Thus, the agency determines the person's residual

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[39] 20 C.F.R. § 404.1503(c).

[40] 20 C.F.R. § 404.1503(d).

[41] 20 C.F.R. § 404.1503(3).

[42] *See* note 22 above.

[43] 42 U.S.C. § 1382c(a)(3)(B).

[44] Table 1 is for applicants able to do only sedentary work, 2 for light, and 3 for medium. The terms sedentary, light and medium are defined in 20 C.F.R. § 404.1510.

[45] An "exertional impairment" limits the strength which an applicant can exert on the job. A non-exertional impairment might be, for example, the required use of a renal dialysis machine.

functional capacity to perform certain levels of work. This determination is naturally an ersatz combination of medical and vocational factors.

Finally, once the correct grid is selected, it is used. The grid contains in tabular form a series of rules which constitutes the Secretary's interpretation of the statutory phrase "age, education, work experience,"[46] which are the determinants of ability to engage in substantial gainful activity *other than* the prior job which the impaired claimant can no longer perform. In essence the grid is a black box into which three variables are fed: age, education, and work experience. When the agency determines the three variables in any particular case the black box is cranked—*i.e.*, the final column on the grid [styled "decision"] is read—and the required result spouts forth: either "disabled," or "not disabled."

It is important to note that while there are of course situations in which the particular applicant's criteria simply do not fit the grid system for one reason or another the grid is not used,[47] where the grid *does* apply the agency—and, in particular, the ALJ—is absolutely required to read and follow the decision in the grid column labelled "decision."

Factored into the grid system is a rule-based administrative notice that persons having certain physical attributes have the vocational capacity to perform certain types of jobs. In short, the grid takes *administrative notice* of the vocational capacity of a particular plaintiff to perform a certain type of job. The rule does not provide for the consideration of contrary testimony on the point, and does not provide for the possibility that an applicant might offer evidence which, in fair litigation not limited by the conclu-

[46] 42 U.S.C. §1382c(a)(3)(B).

[47] 20 C.F.R. § 404.1513 Subpart P, App. 2 § 200.00(a) ("Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case . . ."). The regulation suggests as an example a person who falls in the middle by being able to do more than light but less than medium work, in which event the grid is used simply for whatever use it may be. *Id.* at § 200.00(d).

sive rule, might be deemed to have overcome the administratively-noticed facts.

3. *Validity of Grid System.* The grid system cannot itself rebut the plaintiff's *prima facie* case, since the grid's use here is invalid for two reasons.

a. *Administrative Notice Deemed Conclusive.* The grid has taken *conclusive* administrative notice of the plaintiff's own vocational capacity to perform certain kinds of jobs. Such conclusive administrative notice expressly violates 5 U.S.C. § 556(e), providing that:

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Accordingly, the regulation being contrary to an act of Congress in that respect, even if judgment should *not* be rendered in favor of plaintiff the case should be remanded to allow plaintiff—should he so desire—to offer rebuttal evidence pursuant to 5 U.S.C. § 556(e) that with his medically determined physical ability he is vocationally unable to perform substantial gainful employment.

b. *Administrative Notice by Rule.* Administrative or judicial notice in its traditional sense is ordinarily expressly taken at the hearing and, in fact, the Administrative Procedure Act—and arguably the Due Process Clause also—requires administrative notice to be expressly taken *at the hearing.* As the Court of Appeals for this Circuit recently wrote:

> The Administrative Procedure Act provides in § 556(c)[sic: § 556(e)]:
>
> > When an agency decision rests on official notice of material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.
>
> The provision is unquestionably applicable to disability cases that are heard before ALJs, because the statute, 42 U.S.C. § 405(b) requires disability decisions to be made "on the basis of evidence adduced at the hearing."
>
> . . . .
>
> Unfairness may result when facts are noticed without precisely indicating the facts and their source. A quick

remark by an ALJ that he takes official notice of availability of jobs in the national economy that would be suitable for the claimant could be unfair for lack of sufficient specificity.[48]

The administrative notice taken here was procedurally invalid because there was not even a "quick remark" at the hearing, there was nothing said at the hearing *at all* about administrative notice which was, then, procedurally improper by reason of 5 U.S.C. § 556(e) and the "evidence adduced at the hearing" requirement of 42 U.S.C. § 405(b).

The possibility that plaintiff can submit a rebuttal affidavit *on appeal* in the Appeals Council does not change the result. The statute states that the decision must be based on evidence "adduced at the hearing"[49]—it does not say on appeal—and it is inconceivable that in passing 5 U.S.C. § 556(e) Congress meant that the rebuttal evidence should be first offered on appeal.

Similarly, the right of the claimant to rebut the underlying findings of actual fact[50] (*e.g.*, age) is not the same as the opportunity to rebut the administratively-noticed fact, namely, the vocational capacity of plaintiff to perform an actual job notwithstanding his medical problems. That administratively-noticed fact is irrebuttable under the grid.

Accordingly, use of the grid does not constitute the requisite rebuttal.

CONCLUSION

When the ALJ found that plaintiff was unable to perform his former job, the burden shifted to the Secretary to prove his defense, namely, that plaintiff was able to do *other* work in the economy, and that such work was available. The secretary failed to carry his burden on rebuttal because:

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[48] *White v. Harris*, 605 F.2d 867, 870 (5th Cir. 1979), *quoting* K. DAVIS, ADMINISTRATIVE LAW § 15.11 (Supp. 1978). *Accord*, *Fruge v. Harris*, 631 F.2d 1244 (5th Cir. 1980).

[49] 42 U.S.C. § 405(b).

[50] 20 C.F.R. § 404.1513, Subpart P, App. 2, § 200.00(a).

1. There was no vocational testimony explaining what kind of work plaintiff could do, given his medical limitations;

2. No vocational evidence outside the grid was administratively noticed even assuming that such a procedure would be valid;

3. The grid cannot serve as the requisite rebuttal vocational testimony because:

A. the regulation precluding plaintiff's adducing contrary rebuttal employment evidence at the hearing violates 5 U.S.C. § 556(e) in that it was improperly *conclusive* administrative notice, and;

B. the administrative notice taken violated 42 U.S.C. § 405(b)'s "adduced at the hearing" requirement and 5 U.S.C. § 556(e) because the ALJ did not even mention at the hearing that he was administratively noticing anything.

Accordingly, since the Secretary failed to carry its burden, the Magistrate recommends that judgment be entered in favor of plaintiff.

DONE this 27th day of February, 1981.

/s/ _____

DAVID A. BAGWELL
United States Magistrate

APPENDIX C

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. BOX 2518
WASHINGTON, D.C. 20013

Refer to: SGC
423-62-1339 January 7, 1980

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. John Broz
Star Route Box 914
Lillian, Alabama 36549

Dear Mr. Broz:

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, and record before the administrative law judge, the additional evidence submitted, and the contentions made in support of the request.

Section 404.947a of Social Security Administration Regulations No. 4 (20 CFR 404.947a) provides that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence, or (4) there is a broad policy or procedural issue which may affect the general public interest. This section also provides that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for re-

view. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council considered the medical statement dated November 15, 1979, from Marvin H. Taylor, M.D. This additional evidence updates the record in your case, but does not describe any greater loss of function than the evidence which was previously considered. Therefore, it does not warrant any change in the decision.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 C.F.R. 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown in the top of this notice.

Sincerely yours,

/s/ _____

DAVID G. DANZIGER,
Member, Appeals Council

cc:
DBS, Baltimore, MD
BO, Fairhope (Mobile), AL
HO, Mobile, AL (ALJ Smith)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. BOX 2518
WASHINGTON, D.C. 20013

OFFICE OF
HEARINGS AND APPEALS

Refer to: SGC
423-54-5376 October 22, 1973

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Richard D. Holmes
Rural Route 1, Box 259
Castleberry, Alabama 36432

Dear Mr. Holmes:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law regulations, the record before the administrative law judge, and the contentions made in support of the request.

Sections 404.947a and 416.1465 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.947a and 416.1465) provide that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence, or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside

within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely Yours,

/s/

DAVID G. DANZIGER
Member, Appeals Council

Appeals File
CF
CF,
Bo, Andalusia (Dothan), AL
HO, Mobile, AL (ALJ Smith)

cc:
Mr. Sam Welch
Attorney at Law
Monroeville, Alabama 36460
SGC:imc 10/15/79

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. BOX 2518
WASHINGTON, D.C. 20013 OFFICE OF
Refer to:SGC HEARINGS AND APPEALS
422-46-1544 June 12, 1980

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Corinne Little
Box 3021
Mobile, Alabama 36605

Dear Ms. Little:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, and the contentions made in support of the request.

Sections 404.947a and 416.1465 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.947a and 416.1465) provide that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence, or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside

within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 403(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include your social security number(s) shown at the top of this notice.

Sincerely yours,

/s/ _____

MARILYN W. CARNEY
Member, Appeals Council

cc:
Mr. Michael J. Salmon
Attorney at Law
Mobile, Alabama 36606

Appeals File
CF,
CF,
DO, Mobile, Mobile, Ala
HO, Mobile, AL (Taggart)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. BOX 2518
WASHINGTON, D.C. 20013

OFFICE OF
HEARINGS AND APPEALS

Refer to: SGC
418-32-5297 July 30, 1980

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Thomas O. Jones
Rural Route 2, Box 127
Elberta, Alabama 36530

Dear Mr. Jones:

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, and the contentions made in support of the request.

Section 404.947a of Social Security Administration Regulations No. 4 (20 CFR 404.947a) provides that the Appeals Council will review a hearing decision where:(1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside

within sixty(60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See Section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,

/s/ _____

MARILYN W. CARNEY
Member, Appeals Council

DBS, Baltimore, MD
BO, Fairhope (Mobile), AL
HO, Fairhope, AL (ALJ Coleman, Jr.)
cc:
Mr. Al Pennington
Attorney at Law
Mobile, Alabama 36602

DEPARTMENT OF HEALTH AND
HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
P.O. BOX 2518
WASHINGTON, D.C. 20013
Office Of Hearings And Appeals

Refer To: SGC

422-28-7431 August 11, 1980

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Fred Soesbe
1006 South Juniper Street
Foley, Alabama 36535

Dear Mr. Soesbe:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

After the request for review of the hearing decision was received a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge and the contentions made in support of the request.

Sections 404.947a and 416.1465 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.947a and 416.1465) provide that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings or conclusions are not supported by substantial evidence, or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside

within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act as amended (42 U.S.C. 405(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,

/s/ _____

MARILYN W. CARNEY
Member, Appeals Council

Appeals File
CF,
CF,
BO, Fairhope (Mobile), AL
HO, Mobile, AL (ALJ Taggart)

cc:
Mr. Kenneth Cooper
Attorney at Law
Bay Minette, Alabama 36507

APPENDIX D

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:

Mr. John Broz
Star Route Box 914
Lillian, AL 36549

NOTICE OF UNFAVORABLE DECISION
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within *60* days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone one of these offices and indicate your intention to file a request for review. You may send a written request for review directly to the Appeals Council, Bureau of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed
November 13, 1979

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of
John Broz
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for
Continuance of
Disability Insurance Benefits

423-62-1339
(Social Security Number)

This cause is before the Administrative Law Judge upon a request for hearing timely filed by John Broz, claimant, seeking review of the adverse determination rendered by the Social Security Administration in which this Agency determined and so ruled that claimant's medical condition had improved and that claimant no longer met the criteria established for a period of disability and disability insurance benefits effective March 1979 and therefore May 1979 would be the last month in which claimant would be entitled to receipt of benefits. A hearing was held in Mobile, Alabama, on October 16, 1979, in which claimant appeared and participated.

ISSUES

The general issue before the Administrative Law Judge is whether the claimant continued to meet the criteria for disability pursuant to Sections 216(i) and 223, respectively, of the Social Security Act, as amended. The specific issues are whether the claimant's disability has ceased and, if so, as of what date. This depends on whether the evidence of record establishes that the claimant's impairment has improved sufficiently so that it is no longer of such severity as to prevent performance of substantial gainful activities.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act, as here pertinent, provides for the establishment of a period of disability for an individual when the requirements of the Act are met and, in effect, that such period shall end with the close of the last day of the second calendar month following the month in which such individual's disability ceases.

Section 223(d)(2)(A) of the Social Security Act, as amended, provides that "an individual (except a widow, surviving divorced wife, or widower for purposes of Section 202(e) or (f)) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether he would be hired if he applied for work. For purposes of the preceding (with respect to any individual) 'Work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions in the country." Section 223 also provides, in effect, that entitlement to disability insurance benefits shall end with the close of the second month following the month in which such individual's disability ceases.

Section 404.1539(a) of Social Security Administration Regulations No. 4 provides that an individual's disability shall be found to have ceased in whichever of the following is the earlier: (1) The month in which the impairment, as established by the medical or other evidence, is no longer of such severity as to prevent him from engaging in substantial gainful activity; or (2) the month in which the individual has regained his ability to engage in substantial gainful activity, after application of the provisions in Section 404.1536.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the documentary evidence of record described in a list of exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

The question in this case is whether the claimant's condition has sufficiently improved as to permit him to again engage in substantial gainful activity. Resolution of this issue requires a determination under the same tests governing an initial application for disability benefits under the Act; i.e., whether the claimant by reason of a medically determinable physical or mental impairment is precluded from engaging in substantial gainful activity, taking into consideration his age, education, training, prior work history, etc. Presuming the claimant can no longer perform his usual work, this requires the consideration and an appraisal of his vocational prospects. Thus, it is not the existence of any impairment or impairments which is controlling, but rather the residual capacity he retains for work activity in spite of his impairment.

Disability under the Social Security Act is not what is commonly known as occupational disability. The test of substantial gainful activity is the possibility of finding employment in any field and is not restricted to the type of work or the earning capacity of the wage earner prior to disablement. Social Security Regulations require that a claimant must have a physical or mental impairment of such severity that they render him unable to engage in any kind of substantial gainful work which exists in the national economy regardless of "whether he would be hired if he applied for work."

The test is not whether the claimant would not be hired because of his impairment or whether a company would discharge him because of it, even though he is successful in doing the work. It is whether he can actually do the work.

On August 22, 1977, Mr. John Broz, the claimant, filed his application for a period of disability and disability insur-

ance benefits wherein he alleged that as of July 1977 and continuing thereafter, he had been precluded from engaging in substantial gainful activity by a bad leg, drop foot, ruptured disc, and damage to the spinal cord. The Social Security Administration determined that claimant was "disabled" as of July 15, 1977, because of his back condition. Pursuant to a continuing disability investigation, it was determined that claimant's disability had ceased in March 1979 due to medical improvement and that his entitlement to benefits would end in May 1979. The claimant appealed this determination.

At the hearing, Mr. Broz testified that he was 32 years of age and had a high school education. Mr. Broz related that he had undergone surgery on his neck in July 1977 and had recently been hospitalized because of his stomach. He wears a cervical collar and uses a cane on occasion for ambulation. He has been informed by his physician that he has a muscle or disc pinching a nerve of the right arm and his pain is sometimes unbearable.

In 1973 claimant injured his head in a swimming pool accident and thereafter experienced weakness in his right shoulder and arm. He was treated with traction and improved but continued to have persistent neck and right arm pain and complained of his legs being weak. A myelogram in July 1977 demonstrated a large central extradural defect at the C5-6. On July 29, 1977, claimant underwent a bilateral cervical laminectomy with excision of a large midline C-5 disc. At the date of discharge, he was ambulatory with no arm discomfort. After discharge from the hospital, he continued to have neck pain, right arm pain and complaints of numbness in his right arm and weakness of the right arm. He was treated by Dr. M. H. Taylor, one of his treating physicians, with traction and a collar without improvement. He also had complaints of an injury resulting from a spear to his right leg and since that time has had a foot problem on the right side. However, when examined in March 1979 by Dr. William R. Bridges, there was full range of neck motion although there were complaints of pain with full extension and flexion. There was no definite weakness or atrophy in the upper extremities. He had complete foot

drop on the right side. Sensory examination revealed a vague hypalgesia of both arms to the shoulder and there was hyperesthesia of the dorsum of the right foot. Dr. Bridges concluded that although the claimant did have some residual from his cervical disc disease as well as an injury to his right peroneal nerve, he was employable and there was no reason why he could not perform lifting up to 50 pounds with occasionally lifting 75 pounds. It was felt that he would not be able to perform extremely heavy activity that involved his neck and shoulder but he could perform routine activities and would be able to climb stairs and perform reaching movements. It was thought that he would benefit from a foot drop brace on the right side. The claimant was assessed as having an 8 percent permanent partial disability regarding his foot drop on the right and a three to four percent permanent partial disability regarding his neck injury resulting in an 11 to 12 percent permanent partial disability on the whole man basis. Several statements were obtained and admitted into evidence from Dr. Marvin H. Taylor which stated that claimant was still totally disabled, but Dr. Taylor gave no clinical or laboratory findings to support this diagnosis; and, thus, the Administrative Law Judge must conclude that the opinion expressed by Dr. Bridges is more persuasive as to the true ability of claimant to engage in any substantial gainful activity. The claimant has complained of severe pain and the Administrative Law Judge recognizes that pain alone can be a disabling impairment, but this allegation does not preclude him from questioning the severity of said pain. A recent examination conducted by Dr. Bridges revealed that claimant has had an excellent postoperative recovery and good return of function. The claimant does not take any medication for relief of pain that would interfere with thought processes. The substantial medical evidence of record reveals that as of March 1979 and continuing thereafter, claimant was not suffering such significant loss of function or severe disabling pain as to be precluded from engaging in all forms of substantial gainful activity.

Therefore, consideration of the evidence in this case establishes that as of March 1979, claimant had no impair-

ment which would preclude him from performing, at the very least, a full range of sedentary work activity. The claimant's past relevant work has been as a commercial painter which would constitute semi-skilled work activity, but claimant would not have transferable job skills to a lighter occupation. The evidence establishes that claimant is only 32 years of age, defined as a "younger individual" pursuant to Section 404.1506, has a high school education as defined by Section 404.1507, and has had prior semi-skilled work activity but would not have transferable job skills to a lighter occupation. Based on the further findings that as of March 1979 and continuing thereafter claimant, at the very least, would have had the residual functional capacity to engage in sedentary work activity, Rule 201.28 of Table No. 1, Appendix 2, Subpart P, Regulation No. 4 applies. Section 404.1513 provides that when the findings of fact made as to all factors coincide exactly with the criteria of a rule, that rule directs a factual conclusion of "disabled" or "not disabled" as specified in the rule. Therefore, as of March 1979, claimant must be found "not disabled."

FINDINGS OF FACT

The Administrative Law Judge finds that:

1. The Social Security Administration determined that claimant ceased to meet the criteria for a period of disability and disability insurance benefits in March 1979, and claimant appealed that determination and complied with all jurisdictional conditions precedent.

2. The claimant was born on January 4, 1947, and pursuant to Section 404.1506 of Social Security Regulations No. 4 is defined as a "younger individual."

3. The claimant has a high school education as defined by Section 404.1507 of Social Security Regulations No. 4.

4. The claimant has had prior substantial gainful activity as a commercial painter.

5. The medical evidence of record reveals that claimant underwent a bilateral cervical laminectomy but had a good postoperative recovery and as of March 1979 had no definite weakness or atrophy in the upper extremities and had

good return of function. The claimant suffered an injury to his right peroneal nerve but has not suffered such significant loss of function as to be precluded from engaging in all substantial gainful activity.

6. Section 404.1513 of Social Security Regulations No. 4 and Rule 201.28 of Table No. 1 of Appendix 2, Subpart P, Regulations No. 4, require that claimant as of March 1979, considering his maximum sustained work capacity, age, education, and work experience, be found "not disabled."

7. The claimant was not under a disability as of March 1979 and continuing thereafter, as defined in the Social Security Act, as amended.

DECISION

It is the decision of the Administrative Law Judge that the claimant no longer meets the criteria for a period of disability and disability insurance benefits pursuant to Sections 216(i) and 223, respectively, of the Social Security Act, as amended, effective March 1979; and May 1979 would be the last month in which he would be entitled to benefits.

/s/ _____

JAMES D. SMITH
Administrative Law Judge

Date: NOV 13, 1979

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:

Mr. Richard Holmes
PR 1, Box 259
Castleberry, AL 36432

NOTICE OF UNFAVORABLE DECISION
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within *60* days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone one of these offices and indicate your intention to file a request for review. You may send a written request for review directly to the Appeals Council, Bureau of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed
August 29, 1979

cc:
Name and Address of Representative:
Sam Welch, Esq.
Suite 8, 201 Pineville Road
Monroeville, AL 36460

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of
Richard Holmes
(Claimant)

(Wage Earner)(Leave blank if same as above)

Claim for
Period of Disability,
Disability Insurance Benefits, and
Supplemental Security Income

423-54-5376
(Social Security Number)

This case comes before the Administrative Law Judge upon a request for hearing timely filed by Richard Holmes, claimant, seeking review of the determination of the Bureau of Disability Insurance, Social Security Administration, that he is not entitled to a period of disability or disability insurance benefits pursuant to Sections 216(i) and 223(a) of the Social Security Act, as amended, and that claimant is not entitled to supplemental security income benefits under Section 1602 of the Social Security Act, as amended, hereinafter referred to as the Act. A hearing was held in Evergreen, Alabama, on August 15, 1979, in which claimant appeared and participated.

ISSUES

The general issues are whether the claimant is entitled to a period of disability under Section 216(i) and to disability insurance benefits pursuant to Section 223(a) of the Social Security Act, as amended; and whether the claimant is eligible for supplemental security income under Section 1602 of the Social Security Act, as amended. The specific issues

are whether the claimant was under a "disability" as defined in Sections 223(d)(1) and 1614(a)(3) of the Act; and if so, when such "disability" commenced and the duration thereof.

For entitlement to disability benefits under Sections 216(i) and 223, it is necessary that the claimant meet a special earnings requirement. The claimant's earnings record shows that the special earnings requirements of the Act were met on October 15, 1976, when the claimant allegedly became unable to work, and that these requirements continue to be met through the date of this decision. Therefore, for entitlement to a period of disability and disability insurance benefits under Title II, the claimant must establish "disability" commencing on or before the date of this decision.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability and Section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) of the Social Security Act, as amended, defines "disability" (except for certain cases of blindness) as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Section 223(d)(2)(A) further provides that "an individual (except a widow, surviving divorced wife, or widower for purposes of Section 202(e) or (f)) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to

any individual) 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Section 223(d)(3) further states "For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Section 1611(a)(1) of Title XVI of the Social Security Act, as amended, provides for the payment of disability benefits to eligible individuals. The criteria for entitlement to such benefits, as contained in Section 1614(a)(3)(A)(B) and (C) of Title XVI of the Act, as well as the implementing regulations of Title XVI of the Act, is identical to the criteria above cited for entitlement to disability benefits under Title II of the Act.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the documentary evidence described in a list of exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

In order to establish entitlement to the benefits for which he has applied, the claimant must sustain the burden of proving by credible evidence that he has a medically determinable physical or mental impairment which, when considered along with his age, education, and experience, is of such severity that he has been unable to engage in any substantial gainful activity for a continuous period that lasted or could be expected to last at least 12 months. Moreover, the impairment must be of such severity that claimant is not only unable to do his usual work but cannot engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether he would be hired if he applied for work. Thus, it is not the existence of any impairment or impairments which is controlling but

rather the residual capacity he retains for work activity in spite of his impairments.

Disability under the Social Security Act is not what is commonly known as occupational disability. The test of substantial gainful activity is the possibility of finding employment in any field and is not restricted to the type of work or the earning capacity of the wage earner prior to disablement. Social Security Regulations require that a claimant must have a physical or mental impairment of such severity that they render him unable to engage in any kind of substantial gainful work which exists in the national economy regardless of "whether he would be hired if he applied for work."

The test is not whether the claimant would not be hired because of his impairment or whether a company would discharge him because of it, even though he is successful in doing the work. It is whether he can actually do the work.

On May 13, 1977, Mr. Richard D. Holmes, the claimant, filed his application for a period of disability and disability insurance benefits wherein he alleged that as of October 15, 1976, and continuing thereafter, he had been precluded from engaging in substantial gainful activity by a back injury. This application was denied on initial determination, and no further action was taken on it. On September 2, 1977, the claimant again filed an application for a period of disability and disability insurance benefits wherein he alleged that as of October 15, 1976, and continuing thereafter, he had been precluded from engaging in substantial gainful activity by a back injury. This application was denied on initial determination and again on reconsideration. The claimant appealed this determination, and Administrative Law Judge Irwin W. Coleman held that claimant was entitled to a period of disability commencing on October 15, 1976, and that this disability ceased on October 31, 1977. This determination was appealed to the Appeals Council. The claimant, however, failed to file a timely appeal to the Appeals Council; and the Appeals Council in an Order issued August 9, 1978, concluded there was not good cause to extend the time for filing and, accordingly, dis-

missed the claimant's request for review. No further action was taken on this application.

On December 1, 1978, the claimant filed his third and present application for a period of disability and disability insurance benefits wherein he alleged that as of October 15, 1976, and continuing thereafter, he had been precluded from engaging in substantial gainful activity by back surgery, headaches, and a stiff neck. This application was denied on initial determination and again on reconsideration. From said adverse determinations, the claimant appealed and complied with all jurisdictional conditions precedent.

A hearing in this cause was held on August 15, 1979, in Evergreen, Alabama, at which time the claimant appeared and participated. Mr. Holmes testified that he was born August 6, 1942, in Conecuh County, Alabama. Mr. Holmes further testified that he had a twelfth grade education but could do very little reading or writing. He is married and resides with his wife and four children. He receives Aid for Dependent Children in the amount of $144 a month, and his son and wife receive supplemental security income benefits. Mr. Holmes further testified that he owned an automobile, had a license and drove.

According to claimant, he last engaged in substantial gainful activity on October 15, 1976, at Dixie plywood as a co-layer. He has also had prior substantial gainful activity in construction work with an insulation company. Mr. Holmes further testified that he used a back support. He stands 6 feet tall, weighs 249 pounds but is not on a diet. His physician said that he was big-boned and a diet was not necessary. He uses home traction. He has headaches and his right leg is numb. He cannot walk far and has to lie down. His leg gets numb and he falls and stumbles. His condition has gotten worse since surgery. He cannot lift the left arm and has pain in the right leg. He cannot operate machinery while on medication. His memory has deteriorated. He also has a renal impairment. He has not been treated for any mental disorder. He undergoes traction for four hours a day.

In order to ascertain claimant's true medical condition, several documents were obtained and admitted into evidence. A review of these documents revealed that a medical report was obtained covering treatment of claimant from October 15 to October 26, 1976, at the Andalusia Hospital. The claimant was admitted to the hospital with low back strain and was given steroids and muscle relaxers. He was treated with conservative measures and the pain improved. He was discharged from the hospital with a final diagnosis of lumbosacral strain and probable herniated disc.

Additional medical evidence was obtained in a medical report dated November 18, 1976, covering a neurosurgical examination of the claimant conducted by Dr. Herbert T. Dukes. After a complete examination, Dr. Dukes concluded that the claimant's picture was more of a lumbosacral strain than a significant nerve root compression disc disease. It was felt that he would benefit from a further period of hospital treatment with conservative treatment and possibly some cortisone injections.

On November 16, 1976, the claimant was admitted to the West Florida Hospital for conservative treatment of clinical herniated left lumbar disc. He did not improve. It was felt that a myelogram was necessary and claimant requested that this be done after Christmas, and was therefore discharged from the hospital on December 22, 1976.

On February 16, 1977, claimant was again admitted to West Florida Hospital with a herniated disc, fifth lumbar right, and underwent surgery. He had no specific postoperative complications and was discharged from the hospital on March 1, 1977.

Additional medical evidence was obtained in several medical reports from Dr. P.G. Batson. The claimant had initially been treated with complaints of back and left leg pain in April 1974. He was again treated for recurrent lumbosacral strain and mild intervertebral disc symptoms in January 1975. In August 1976, he slipped and had pain in the lumbosacral and left sciatic notch. He did not respond to conservative measures. In February 1977, he was operated on for a herniated disc, lower spine. The claimant was again examined in September 1977, for complaints of urinary symp-

toms of impotence. His medication was refilled. Dr. Batson concluded that claimant could return to work in November 1, 1977.

On March 30, 1978, claimant was admitted to the Jackson Hospital and Clinic because of back and right lower extremity pain. A myelogram was performed and showed a filling defect at the L4 level which appeared to be central. Thoracic and cervical myelograms were normal. The claimant complained of the right shoulder, and x-rays were reported as normal. The claimant was discharged from the hospital on April 5, 1978, with a final diagnosis of recurrent radiculitis on the right.

On March 3, 1978, claimant was examined by Dr. J. L. Bostwick. After a complete examination was concluded, the claimant had residuals of an L4-5 radiculitis. It was felt that a repeat myelogram should be carried out which could help clarify the problem and allow a definite percentage to be given as to claimant's disability. The claimant was thereafter hospitalized and underwent a myelogram. Dr. Bostwick rated claimant as having a medical disability at 15 percent permanent partial disability of the back to the body as a whole, and his work disability was 30 percent. His diagnosis remained postoperative disc syndrome manifested by continuing radicular pain and weakness.

Further medical evidence was obtained in a medical report dated July 18, 1978, from Dr. P. G. Batson, Jr. Examination of the claimant revealed subjective right sciatica, flexion to 20 degrees, extension to 5 degrees, and right lateral bending 10 degrees, left lateral bending 10 degrees with some decrease in the right lower extremity pain. There was decreased activity in the right ankle as compared to the left. The claimant was diagnosed as having a 15 percent permanent partial impairment and as having reached maximum medical improvement prior to the date of examination. Further surgery was not recommended. Dr. Batson indicated that the claimant could not return to his prior work activity but could perform sedentary work activity.

Further medical evidence was obtained in the office records covering treatment of the claimant from August 3,

1976, through February 9, 1979, from Dr. Joe D. Sanders, one of claimant's treating physicans. In brief, these records revealed that claimant was treated repeatedly for complaints of low back pain for which he was prescribed medication. Dr. Sanders diagnosed claimant as having postoperative disc syndrome, lumbar region; subjective sciatica, right side; and difficulty voiding, secondary to the above.

On January 22, 1979, claimant underwent a consultative examination conducted by Dr. Robert W. Moore, Jr. The claimant had full range of motion of the cervical spine without spasm. Neurological examination of the upper extremities was within normal limits with no decreased range of motion or atrophy of any joint. The midline incision of the lumbar spine was well healed. Straight leg raising was negative, sitting; however, on lying down, the claimant complained of pain at 25 degrees bilaterally. X-rays of the cervical spine revealed some reversal of the normal lordosis. X-rays of the lumbar spine were within normal limits. Dr. Moore felt claimant could lift 50 pounds occasionally to 25 pounds frequently, stand and walk six or more hours in a normal work day and sit and work six out of eight hours. It was felt that the claimant would be restricted in climbing, balancing, and bending and/or stooping movements. The claimant was diagnosed as having pain in the cervical spine of undetermined etiology and post laminectomy pain with considerable psychogenic overlay.

The final medical evidence of record consisted of medical records covering treatment of the claimant from June 28 through July 3, 1979, at the Andalusia Hospital. The claimant was admitted to the hospital and underwent an appendectomy. There were no complications and claimant was discharged from the hospital.

The medical evidence shows that the claimant's conditions are not attended by clinical findings that meet or equal in severity the requirements of the Appendices to Subparts P and I, of Regulations No. 4 and No. 16, respectively, and therefore, the claimant cannot be found disabled by medical considerations alone. Moreover, the claimant is not engaging in substantial gainful activity. Consequently, the issue before the Administrative Law Judge is whether

the claimant's impairments prevent him from performing his usual work; and if so, whether those impairments prevent him from performing other kinds of substantial gainful activity.

In view of the fact that claimant does not meet or equal the requirements as elucidated above, other regulations are now pertinent which are:

Section 404.1503 of Regulations No. 4, and Section 416.903 of Regulations No. 16 provide, in effect, that in cases where claimants with a severe impairment are not actually engaging in substantial gainful activity, they may be found disabled if their impairment(s) meets the duration requirement and are either listed in Appendix 1, Subpart P, Regulations No. 4, and Appendix 1, Subpart I, Regulations No. 16, or are determined to be medically the equivalent of a listed impairment.

Section 404.1505(a) of Regulations No. 4 and Section 416.905(a) of Regulations No. 16 provide, as pertinent herein, that the kind and severity of the impairment(s) determines the individual's work limitations and residual functional capacity. Furthermore, assessments of residual functional capacity may be based solely on medical evidence where such evidence includes sufficient findings (e.g., signs, symptoms, and laboratory findings) to support the necessary judgments where relevant with respect to the individual's physical, mental, and sensory capabilities.

Section 404.1505(f) of Regulations No. 4 and Section 416.905(f) of Regulations No. 16 provide that where the residual functional capacity so determined is not sufficient to enable the claimant to do his or her previous work, it must be determined what work, if any, the claimant can do, taking into account the claimant's residual functional capacity, age, education, and work experience.

Section 404.1510(a) of Regulations No. 4 and Section 416.910(a) of Regulations No. 16 state, "(F)or the purpose of determining exertional requirements of work in the national economy, jobs are classified as 'sedentary', 'light', 'medium', 'heavy', and 'very heavy'."

Section 404.1506 of Regulations No. 4 and Section 416.906 of Regulations No. 16 provide that the term "age" refers to chronological age and that a claimant under age 50 is a younger individual, from age 50 to 54 is approaching advanced age, and over age 55 is of advanced age.

Section 404.1507 of Regulations No. 4 and Section 416.907 of Regulations No. 16 provide that "educational" is primarily used in the sense of formal schooling or other advanced training which contributes to the claimant's ability to meet vocational requirements and is classified as illiteracy, marginal education, limited education, and high school education and above.

Section 404.1511 of Regulations No. 4 and Section 416.911 of Regulations No. 16 provide that for the purposes of assessing the skills reflected by the claimants' work experience, and of determining the existence (in the national economy) of work they are competent to do, occupations are classified as "unskilled", "semi-skilled", and "skilled."

Sections 404.1511(e) and 416.911(e) of the above regulation provide that claimants are considered to have transferable skills when the skilled or semi-skilled work functions which they have demonstrated in their past work can be applied to meet the requirements of skilled or semi-skilled work functions of other jobs or kinds of work. This paragraph essentially states that transferability depends largely on the similarity of "occupationally significant work functions among jobs," but that complete similarity is not necessary to warrant the inference of transferability.

Section 404.1513 of Regulations No. 4 and Section 416.913 of Regulations No. 16 provide for "Appendix 2" which sets forth rules reflecting the major functional and vocational patterns which are encountered in cases in which claimants (1) are not actually engaging in substantial gainful activity, (2) do not qualify on medical considerations alone, and (3) are prevented by a medically determinable impairment from returning to their "vocationally relevant" past work. This regulation further provides, in effect, that when the findings of fact made as to all factors (age, education, transferability of skills, work experience, and maximum level

of sustained work capability) coincide with the criteria of a rule, that rule directs a factual conclusion of disabled or not disabled.

Administrative Law Judge Irwin W. Coleman in his decision issued February 8, 1978, concluded that claimant, based on his application filed on March 13, 1977, was entitled to a period of disability commencing on October 15, 1976, the date claimant suffered a back injury while at work which ultimately led to a laminectomy to repair a herniated disc, up to and including October 31, 1977. The claimant's own treating physician, Dr. P. G. Batson, a Board-certified orthopedic surgeon, verified that claimant as of November 1, 1977, could again engage in substantial gainful activity. There is nothing in the medical evidence of record that would warrant a reopening of that prior determination or that would indicate that claimant is entitled to a later period of disability. In a recent examination conducted by Dr. Moore, claimant had full range of motion of the cervical spine without spasm. Neurological examination of the upper extremities was within normal limits with no decreased range of motion of any joint or atrophy noted. The lumbar spine had no significant muscle spasm and range of motion was not limited. Straight leg raising was negative. He did not have a neurological deficit. The claimant was diagnosed as having only pain in the cervical spine of undetermined etiology and post laminectomy pain with considerable psychogenic overlay. The Administrative Law Judge recognizes that pain alone can be disabling, but this allegation does not preclude him from questioning the severity of said pain. In the present case, the claimant does not take medication for relief of pain that would interfere with thought processes. The substantial medical evidence of record does not indicate that claimant as of October 31, 1977, suffered such significant loss of function or severe disabling pain as to be precluded from engaging in all forms of substantial gainful activity.

The claimant has had prior substantial gainful activity in the construction industry with an insulation company and at Dixie Plywood as a co-layer. His prior substantial gainful activity consisted of semi-skilled work activity, and he

would not have transferable job skills to lighter occupations. The claimant would not have had the residual functional capacity to return to his former occupations, but, at the very least, would have had the residual functional capacity as of November 1, 1977, to have engaged in sedentary work activity.

The evidence revealed that the claimant is 37 years of age, (defined as a younger individual pursuant to Sections 404.1506 and 416.906 of Social Security Regulations No. 4 and No. 16, respectively). The claimant does have a 12th grade education, but testified at the hearing that he could read and write only to a limited extent and had received social promotions. However, even presuming that claimant is an illiterate as defined under Social Security Regulations, this finding would not preclude claimant from returning to substantial gainful activity. The claimant is semi-skilled and does not have transferable job skills to lighter occupations. Based on the further finding that claimant has the residual functional capacity to engage in sedentary work activity and considering claimant's age and alleged education with inability to read or write, Rule 201.23 of Table No. 1, Appendix 2, Subpart P, Regulations No. 4 and Subpart I, Regulations No. 16 applies. Since Sections 404.1513 and 416.913 provides that when the findings of fact made as to all factors coincide exactly with the criteria of a rule, that rule directs a factual conclusion of disabled or not disabled as specified in the rule. Under the foregoing circumstances, the Administrative Law Judge must conclude, pursuant to the Law and Regulations, that as of November 1, 1977, and continuing thereafter, claimant was not entitled to a period of disability, disability insurance benefits or supplemental security income benefits.

FINDINGS OF FACT

The Administrative Law Judge finds that:

1. On December 1, 1978, claimant filed his application for a period of disability and disability insurance benefits and thereafter on December 5, 1978, filed his application for supplemental security income benefits and complied with all jurisdictional conditions precedent.

2. The claimant met the special earnings requirements of the Act for disability insurance benefits purposes on October 15, 1976, the date of alleged disability, and continues to meet the earnings requirements up to and including the date of this decision.

3. Claimant was born on August 6, 1942, and pursuant to Sections 404.1506 and 416.906 of Social Security Regulations No. 4 and No. 16, respectively, would be defined as a "younger individual."

4. Claimant completed 12 grades of education but can neither read or write and pursuant to Sections 404.1507 and 416.907 of Social Security Regulations No. 4 and No. 16, respectively, would be defined as an individual who is "illiterate."

5. Claimant has performed substantial gainful activity as a co-layer in the plywood industry and laborer in the construction industry.

6. The medical evidence of record revealed that claimant had a prior period of disability from August 15, 1976, through October 31, 1977, because of a back injury which ultimately led to a laminectomy. However, claimant's own treating physician indicated that as of November 1, 1977, claimant could return to substantial gainful activity. While claimant still has low back pain, there is no limitation of motion; and there has been no sensory, motor, or reflex abnormalities.

7. Section 404.1513 and 416.913 of Social Security Regulations No. 4 and No. 16, respectively, and Rule No. 201.23 Table No. 1 of Appendix 2, Subpart P, Regulations No. 4 and Subpart I, Regulations No. 16, require that claimant, as of November 1, 1977, considering his maximum sustained work capacity, age, education, and work experience, be found "not disabled."

8. The claimant was not under a disability as defined in the Social Security Act, as amended, as of November 1, 1977, and continuing thereafter.

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed December 1, 1978, the claim-

ant is not entitled to a period of disability or disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. It is further the decision of the Administrative Law Judge that based on the application filed December 5, 1978, the claimant is not entitled to supplemental security income benefits under Section 1602 of the Social Security Act, as amended.

/s/ _____

JAMES D. SMITH
Administrative Law Judge

Date: Aug 29, 1979

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:
Ms. Corinne Little
Box 5021
Mobile, AL 36605

NOTICE OF UNFAVORABLE DECISION
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within *60* days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise.

You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone one of these offices and indicate your intention to file a request for review. You may send a written request for review directly to the Appeals Council, Bureau of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review in your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed
March 19, 1980

cc
Name and Address of Representative:
Mr. Michael J. Salmon
Attorney at Law
2453 Commercial Park Drive
Mobile, AL 36606

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of
Corinne Little
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for Period of Disability, Disability Insurance Benefits, and Supplemental Security Income

422-46-1544
(Social Security Number)

This case is before the Administrative Law Judge on a Request for Hearing.

ISSUES

The general issues before the Administrative Law Judge are whether the claimant is entitled to a period of disability, disability insurance benefits and supplemental security income under Sections 216(i), 223 and 1614(a)(3)(A), respectively, of the Social Security Act, as amended. The specific issues are whether the claimant was under a "disability" as defined in the Act and, if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

The claimant's earnings record shows that the special earnings requirements of the Act were met on October 13, 1978, when the claimant allegedly became unable to work, and that these requirements continue to be met through the date of this decision. Therefore, the claimant must establish

"disability" commencing on or before the date of this decision.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and Section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 1602 of the Social Security Act provides for the payment of supplemental security income to disabled individuals where the requirements specified therein are met.

Sections 223(d)(1) and 1614(a)(3)(A) of the Social Security Act define disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Sections 223(d)(2)(A) and 1614(a)(3)(B) further provide that an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of "such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy. . . ."

Sections 223(d)(3) and 1614(a)(3)(C) further define a "physical or mental impairment" as an impairment that results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Social Security Administration Regulations 404.1503(d) and 416.903(d) provide, in effect, that in cases where claimants with a severe impairment are not actually engaging in substantial gainful activity, they may be found disabled if their impairment or impairments meet the duration requirement and are either listed in Appendix 1, Subpart P, Regulation No. 4, or Appendix 1, Subpart I, Regulations No. 16, or are determined to be medically the equivalent of a listed impairment.

Regulations 404.1505(a) and 416.905(a) provide, as pertinent herein, that the kind and severity of the impairment

or impairments determine the individual's work limitations and residual functional capacity. Furthermore, assessments of residual functional capacity may be based solely on medical evidence where such evidence includes sufficient findings (e.g., signs, symptoms, and laboratory findings) to support the necessary judgment.

Regulations 404.1503(f) and 416.903(f) provide that where residual functional capacity is not sufficient to enable claimants to do their past relevant work, assessment is made to determine what work if any, they can do, taking into consideration residual functional capacity, age, education, and work experience.

Regulations 404.1510(a) and 416.910(a) provide that for the purpose of determining exertional requirements of work in the national economy, jobs are classified as "sedentary," "light," "medium," "heavy," and "very heavy."

Regulations 404.1511(a) and 416.911(a) provide that for the purposes of assessing the skills reflected by claimants' work experience, and of determining the existence in the national economy of work they are competent to do, occupations are classified as "unskilled," "semi-skilled," and "skilled."

Regulations 404.1511(e) and 416.911(e) provide that claimants are considered to have transferable skills when the skilled or semi-skilled work functions which they have demonstrated in their past work can be applied to meet the requirements of skilled or semi-skilled work functions of other jobs or kinds of work. This paragraph essentially states that transferability depends largely on the similarity of "occupationally significant work functions among jobs," but that complete similarity is not necessary to warrant the inference of transferability.

Regulations 404.1513 and 416.913 discuss "Appendix 2," which sets forth rules reflecting the major functional and vocational patterns which are encountered in cases in which claimants (1) are not actually engaging in substantial gainful activity, (2) do not qualify on medical considerations alone, and (3) are prevented by a medically determinable impairment from returning to their "vocationally relevant" past work. These regulations further provide, in effect,

that when the findings of fact made us to all factors (age, education, transferability of skills, work experience, and maximum level of sustained work capability) coincide with the criteria of a rule, that rule directs a factual conclusion as to whether the claimant is "disabled" or is "not disabled."

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the evidence.

EVALUATION OF THE EVIDENCE

The medical evidence shows that the claimant's conditions are not attended by medical or clinical findings that meet or equal in severity the requirements of the Appendices to Subparts P and I of Regulations Nos. 4 and 16, respectively, and therefore, the claimant cannot be found disabled by medical considerations alone. Moreover, the claimant is not engaging in substantial gainful activity. Consequently, the issue before the Administrative Law Judge is whether the claimant's impairments prevent her from performing her usual work, and if so, whether those impairments prevent her from performing other kinds of substantial gainful activity.

The claimant testified that she was 44 years old, five feet five inches tall, and 107 pounds. She has an eighth grade education and she can read and write. She is not married. Ms. Little has a driver's license but does not drive at the present because of her vision and nerves. The Vocational Rehabilitation department has sent her for x-rays to see a doctor and was in the process of giving her a week's training period. However, she became ill and had to go into the hospital in March, 1979. Her hobbies were growing flowers and gardening. She can no longer do either. The claimant's symptoms have been described as inflamed and painful stomach spasms, locked bowels, and bad lungs. Her past relevant work includes being the assistant manager of a lounge, a barmaid, and a cashier. Her duties included keep-

ing inventory, keeping up with the cash, serving and cleaning.

Mr. Dennis Simmons, the claimant's friend for years, testified that he lives near the claimant and has seen her frequently during the last two and one-half years. He also indicated that in December, 1979, the claimant was hospitalized and thereafter he and his wife had been over and were taking care of her, along with other neighbors and friends. It is his opinion that her physical abilities are poor because she is not able to do anything, especially not able to stand on her feet for eight hours. She has difficulty getting from her bed to the kitchen table.

Mrs. Inez Simmons, was sworn and testified that she has nursed and assisted the claimant because of her weakness and she cannot stand up very long. Mrs. Simmons further testified that Ms. Little was not able to stand on her feet for eight hours.

On October 26, 1978, the claimant complained of twisting in her abdomen, smothering around her heart and lungs and nervousness (Exhibit 18). However, Dr. E. Russell March, Jr., stated that the claimant's problem does not have an organic basis, in light of all the recent negative laboratory data. The claimant's physical examination showed a well-developed, well-nourished female. Her chest was clear, soft abdomen, and hiatus hernia that was symptomatic, but she does not have reflux esophagitis. Her past history is pertinent in that she has a history of smoking and she is allergic to codeine and phenobarbital.

Exhibit 20 is a letter dated October 15, 1979, evidencing the claimant's State Vocational Rehabilitation participation since October, 1978, and relating the information from the State Department regarding the claimant's condition. The facts were also mentioned that the claimant had numerous tests and medical treatment.

Four months prior to admission, Ms. Little had not been taking her antispasmodic medication (Exhibit 19). Then on May 31, 1979, the claimant was admitted to Providence Hospital, Mobile, Alabama, for gastrointestinal complaints. However, she was found to have a lung lesion in the right upper lobe. Radiological consultation by Dr. E. H. Borak

on May 31, 1979, indicates negative abdomen but nodular density overlaying the right upper lobe which was of uncertain etiology and warranted further evaluation. A follow-up examination of the chest again revealed 2 cm nodule in the right upper lung; however, it does not appear to contain calcification and the possibility of primary neoplasm was to be considered. Continued complaints of abdominal pain probably encouraged lung and bronchial biopsy on June 8, 1979, which revealed scarring and increased hemosiderin laden macrophages within alveoli and interstitial tissue. However, no evidence of neoplasm or specific granuloma could be identified. The surgical pathology report of Dr. Phillip A. Snodgrass, dated June 11, 1979, described the claimant's bronchi sectioned centrally showing some mucoid material with focal inflammation. The bronchial lymphatics were free of tumor. A right upper lobectomy of the lung and thoracotomy was performed. Then the claimant was given a satisfactory status rating.

Dr. Snodgrass saw Ms. Little on a consultative and post-operative basis several times (Exhibit 17). On two separate occasions, he has recommended that any patient with carcinoma of the lung should be considered totally and permently disabled (Exhibit 26). However, a favorable prognosis for Ms. Little is expected for long term survival, based on the cell type and location of her lesion. No evidence of recurrence has been identified. She should have no disability concerning her breast or her present complaints of epigastric distress.

Dr. Raymond L. Bell was impressed that the claimant's gastrointestinal status appears to represent a spastic irritable colon and irritable bowel syndrome (Exhibit 21). In regard to her psychiatric status Dr. Bell is quoted, "I think the patient is capable of managing her funds and capable of caring for herself. However, I do feel that she exhibits a moderate level of anxiety which might also be contributing to some of her physical abnormalities. Therefore, in evaluating her physical capacities, ten pounds or less frequently as a reasonable lifting and/or carrying expectation, and standing and working from two to three hours during a normal work day. There are restrictions relating to her

pushing and pulling, climbing; fine manipulation and reaching because of her weakness in her right hand. In addition ... she is unable to function in any stressful situation."

Dr. David R. Clarkson remarked, without the production of any supportive clinical and/or medical evidence, that Ms. Little has been under his care and unable to work, and she has a variety of somatic complaints (Exhibit 25). She is scheduled for a biopsy of a new mass lesion to rule out breast carcinoma in about ten days.

In reaching a decision in this case, the Administrative Law Judge has not ignored the opinions of Dr. Snodgrass and Dr. Clarkson, the claimant's physicians. However, the opinions will be given weight to the extent they are supported by specific and complete clinical findings insofar as they are consistent with the weight of the other evidence in the case. Here, however, the Administrative Law Judge finds those opinions controverted by evidence from other sources which is more persuasive as to the true ability of the claimant to engage in any substantial gainful activity. I believe the medical evidence supports a finding that the claimant can do sedentary work.

The evidence shows that the claimant is 44 years old, which is defined as a "younger individual" by Regulations 404.1506, and 416.906 and has a "limited" eighth grade education as defined by Regulations 404.1507 and 416.907. I further find that she has a maximum sustained work capacity to perform sedentary work, as defined by Regulations 404.1510 and 416.910. Therefore, Rule 201.24, Table No. 1 of Appendix 2, Subparts P and I, Regulations Nos. 4 and 16 applies. Since Regulations 404.1513 and 416.913 provide that when the findings of fact made as to all factors coincide exactly with the criteria of a rule, that rule directs a factual conclusion of "disabled" or "not disabled" as specified in the Rule. Hence, the claimant must be found "not disabled."

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the special earnings requirements of the Act on October 13, 1978, the date she stated she became unable to work, and continues to meet them through the date of this decision.

2. The claimant has the following impairments:
   (a) gastrointestinal complaints, and
   (b) carcinoma of the lungs

3. The claimant's allegations of stomach discomfort and nervousness are not credible.

4. The claimant's impairments do not prevent her from performing work requiring lifting ten pounds or less frequently and walking/standing for two or three hours of the work day.

5. The claimant is unable to perform her past relevant work as a barmaid, etc. This work required such movement as pushing, pulling, climbing, fine manipulation and reaching.

6. The claimant has the residual functional capacity for sendentary work as defined in Section 404.1510(b) of Subpart P, Regulations No. 4 and in Section 416.910(b) of Subpart I, Regulations No. 16.

7. The claimant is 44 years old, which is defined as a "younger individual".

8. The claimant has an eighth grade education (limited).

9. The issue of transferability of work skills is not material.

10. Regulations 404.1513 and 416.913 and Rule 201.24, Table No. 1 of Appendix 2, Subparts P, and I, Regulations No. 4 and No. 16 direct that the claimant, considering her maximum sustained work capability, age, education, and work experience, be found "not disabled."

11. The claimant was not under a "disability" was defined in the Social Security Act, as amended, at any time up to the date of this decision.

DECISION

It is the decision of the Administrative Law Judge that, based upon the applications filed on July 3, 1979, the claimant is not entitled to a period of disability, disability insurance benefits, or supplemental security income benefits un-

der Sections 216(i), 223, and 1614(a)(3)(A), respectively, of the Social Security Act, as amended.

/s/ _____
JOHN W. TAGGART
Administrative Law Judge

Date: MARCH 19, 1980

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:
Mr. Thomas O. Jones, Sr.
Rural Route 2, Box 127
Elberta, Alabama 36530

NOTICE OF DECISION—DENIAL
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within *60* days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise.

If you wish to request review, you (or your representative) should file the request at your local social security office. The people there will supply you with a request for review form and will be glad to assist you in completing the form. However, if you prefer, you may file your request for review at the hearing office or by sending a letter, requesting review, directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing
decision mailed
May 8, 1980

cc:
Name and Address of Representative:
Mr. Al Pennington
Attorney at Law
602 Church Street
Mobile, Alabama 36602

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of
Thomas O. Jones, Sr.
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for
Period of Disability and Disability Insurance Benefits

418-32-5297
(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case comes on before the undersigned Administrative Law Judge upon a timely request for hearing filed by the claimant, who disagrees with the determination of the Bureau of Disability Insurance, Social Security Administration, that he is not entitled to a period of disability or disability insurance benefits under the Social Security Act, hereinafter referred to as the Act.

On May 27, 1975, the claimant filed his initial application for a period of disability and disability insurance benefits. The application was denied on initial determination and again on reconsideration. The claimant appealed that determination. Administrative Law Judge William A. Brewer in his decision issued May 18, 1976, denied the claimant's application and no further action was taken on that application. On January 18, 1979, the claimant filed a second and present application for a period of disability and disability insurance benefits. The application was denied on initial determination and again on reconsideration. The claimant filed a timely request for hearing.

After due notice, a hearing was held in Mobile, Alabama, at which the claimant appeared personally and testified.

The claimant was represented at the hearing by Mr. Al Pennington, an attorney-at-law.

STATEMENT OF THE ISSUES AND APPLICABLE LAW

The general issues before the Administrative Law Judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under Section 216(i) and 223, respectively, of the Act. The specific issues are whether the claimant was under a "disability" as defined in the Act, and if so, when such disability commenced, the duration thereof and whether the special earnings requirements of the Act are met for the purpose of entitlement.

The claimant's earnings record shows that the special earnings requirements of the Act are met until December 31, 1979.

Section 216(i) of the Act provides for the establishment of a period of disability and Section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) of the Act defines "disability" (except for certain cases of blindness) as the:

> "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Section 223(d)(2)(A) further provides that:

> "an individual except a widow, surviving divorced wife, or widower for purposes of Section 202(e) or (f) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual) 'work which exists in the national economy' means

work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Section 223(d)(3) further states:

"For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the documentary evidence described in the exhibits attached to this decision.

SUMMARY OF THE EVIDENCE

SUMMARY OF THE CLAIMANT'S TESTIMONY

At the hearing, the claimant testified that he was 52 years of age, stood six feet one inch tall and weighed 245 pounds. He has a driver's license and occasionally drives. He is married and has two children, ages 32 and 30, by a prior marriage. He has a tenth grade education and can read, write and manage his own financial affairs. He was last employed by the telephone company and retired in 1975, after 29 years of service.

When asked to discuss his medical difficulties, the claimant testified that he had fallen off a pole in 1965, and suffered a crushed vertebra in the back. His condition continued to deteriorate and he had to retire in 1975. He has also had sinus trouble. His doctors have told him that that condition could get worse instead of better. He also forgets things and has difficulty rembering.

On an average day, now that he is unemployed, he does odd jobs around the house. The sole income since he has been unemployed has consisted of proceeds of $200 a month from an insurance policy that was paid until November, 1979, and disability pension from the telephone company of

$340 a month. His wife is employed as a registered nurse and earns close to $10,000 a year.

The claimant further testified that he had periodic check-ups every three months in connection with his disability from South Central Bell, his former employer. His examining physician has never recommended that he return to South Central Bell to work activity. Anything that he lifts causes back pain. Sometimes, it is two or three days before he can move around. The claimant also related that he would lose his disability pension from South Central Bell if he took another job.

SUMMARY OF THE MEDICAL EVIDENCE

The medical reports which were before Administrative Law Judge William A. Brewer in his decision issued May 18, 1976, have been adequately summarized and are incorporated herein by reference. In brief, these medical reports reveal that the claimant had osteoarthritis of the lumbar spine and degenerative disc disease at L5-S1 disc level, but there was no neurologic deficit and the claimant did not require surgery; there was no substantial limitation of motion, muscle weakness or other findings indicative of a severe musculoskeletal dysfunction.

On April 17, 1976, the claimant was admitted to the South Baldwin Hospital, Foley, Alabama, with complaints of pain in the low back. There was some limitation of low back motion by complaints of pain, but reflexes were normal, sensation was intact, and there was good muscle strength present throughout. The claimant was diagnosed as having a low back syndrome with recurrent pain and was treated with conservative measures including rest, diet and daily care by a physical therapist; he responded to treatment and was discharged from the hospital on April 23, 1976. (Exhibit B-13)

On April 9, 1979, the claimant underwent an examination conducted by Dr. H.C. George for complaints of chronic back problem. The claimant described a history of a back injury in 1965, and alleged that since then he had only rarely been free of pain. On physical examination, the claimant stood 73 inches tall, weighed 242 pounds and stood with a

somewhat flat back stance and his gait was normal. There was tenderness from the upper paravertebral muscles down into the gluteal regions. There was no fixed spasm and his range of motion was fairly good, flexing to 60 degrees and lacking eight inches of reaching his toes. The neurological evaluation was within normal limits. X-rays of the lumbosacral spine showed some narrowing and anterior spur formation with a small spur on the left at L3-4 and a narrow and wedged T12 vertebral body. The claimant was diagnosed as having an old compression fracture 12th thoracic vertebrae and degenerative disc disease L3-4. In his physical capacity evaluation, it was concluded by Dr. George that the claimant could reasonably be expected to lift and/or carry 20 pounds occasionally to ten pounds frequently, and stand and walk six or more hours and sit and work as much as six out of eight hours. (Exhibit B-14)

Additional medical evidence was obtained in a medical report dated June 30, 1979, from Dr. John Gerwin, one of the claimant's treating physicians. Dr. Gerwin reported that the claimant had been treated since March 6, 1979, for complaints of sinus problems. He had been found to have allergic rhinitis and sinusitis and had been treated with Celestone, Tetracycline and Tyzine. When examined on March 9, 1979, he was much better and he was advised to complete his initial medication and then continue with a new prescription. He had not been seen since that time. (Exhibit B-15)

Additional medical evidence was obtained in a medical report dated July 3, 1979, from Dr. John E. Foster, one of the claimant's treating physicians. The claimant was diagnosed as having disc syndrome; vertebral body disease; and low back syndrome. The claimant was diagnosed as having a total disability. There were insufficient clinical and laboratory findings given to support Dr. Foster's conclusion of disability. (Exhibit B-16)

On August 14, 1979, the claimant was examined by Dr. M. Preston Daugherty, Jr. On examination, the claimant was well developed, slightly obese and appeared to be in no acute distress. He stood 73½ inches tall and weighed 242 pounds. Examination of the spine in the erect position re-

vealed that the claimant jumped away from the examining hand and exaggerated all movements when he was palpated in the lumbar spine area. There were no muscle spasm palpable. There was good muscle strength present. Neurologically, there was negative straight leg raising. There were no sensory abnormalities found. X-rays of the lumbar spine revealed some anterior superior lipping of the L4 and slight diminished L5-S1 intervertebral disc space. Dr. Daugherty concluded that based on the physical findings, he could not substantiate the severity of the claimant's complaints. He did have degenerative changes early, present in the L5-S1 intervertebral disc space, not verified by physical findings as to herniated disc. In his physical capacity evaluation, Dr. Daugherty concluded that the claimant could reasonably be expected to lift and/or carry 20 pounds occasionally to ten pounds frequently, stand and walk six or more hours in a normal workday and sit and work as much as six out of eight hours. (Exhibit B-17)

EVALUATION OF THE EVIDENCE

For entitlement to disability insurance benefits under the Act, the claimant must establish a medically determinable physical or mental impairment, or a combination thereof, which when considered along with age, training, experience, and abilities, prevents the performance of any substantial gainful activity. The evidence must show not only an impairment or a combination thereof preventing performance of the usual occupation, but the lack of residual capacity to perform other occupations within a vocational potential. Thus, the existence of an impairment is not controlling, but rather the residual capacity the individual retains for work activity in spite of such impairment. Therefore, in evaluating the evidence of record, the Administrative Law Judge must objectively examine the clinical, laboratory, medical and other evidence to determine if any impairments exist and to what extent these may interfere with the claimant's normal physical and mental functioning.

Section 404.1501(c) of Social Security Administration Regulations No. 4 (20 CFR 404.1501(c)) in defining "impairment" provides not only that a physical or mental im-

pairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, but that statements of the claimant, including his own description of his impairment (symptoms) are, alone, insufficient to establish the presence of a physical or mental impairment and determine whether on or before that date the severity of claimant's impairments was of a degree that such could be expected to terminate in death or would continue for a period of not less than twelve (12) continuous months from that date.

It is well established that it is the claimant's responsibility to furnish convincing evidence that he is entitled to the benefits claimed. It is not the responsibility of the Administration to establish that the individual is not impaired to the degree claimed.

Social Security Administration Regulations 404.1503 ff. provide, in effect, that in cases where claimants with a severe impairment or impairments are not actually engaging in substantial gainful activity, they may be found disabled if their impairment or impairments meet the duration requirement and is either listed in Appendix 1, Subpart P, Regulations No. 4, or are determined to be medically the equivalent of a listed impairment.

Regulation 404.1505(a) provides, as pertinent herein, that the kind and severity of the impairment(s) determine the individual's work limitations and residual functional capacity. Moreover, assessments of residual functional capacity may be based solely on medical evidence where such evidence includes sufficient findings (e.g., signs, symptoms, and laboratory findings) to support the necessary judgment.

Regulation 404.1505(b) provides, as pertinent herein, that assessment of physical capacities (e.g., strength and exertional capabilities) includes an evaluation of the individual's maximal residual functional capacity for sustained activity on a regular basis. The assessment includes the evaluation of the individual's ability to perform significant physical functions such as walking, sitting, standing,

lifting, carrying, pushing, pulling, reaching, handling, seeing, hearing, and speaking.

Regulation 404.1505(d) provides that when an individual has a non-exertional impairment in addition to an exertional impairment, the residual functional capacity must be assessed in terms of the degree of any additional limitations of the claimant's ability to work.

Regulation 404.1503(f) provides that where residual functional capacity is not sufficient to enable claimants to do their previous work, assessment is made to determine what work, if any, they can do, taking into consideration residual functional capacity, age, education, and work experience.

Regulation 404.1510(a) provides that for the purpose of determining exertional requirements of work in the national economy, jobs are classified as "sedentary," "light," "medium," "heavy," and "very heavy."

Regulation 404.1511(a) provides that for the purpose of assessing the skills reflected by claimants' work experience, and determining the existence in the national economy of work they are competent to do, occupations are classified as "unskilled," "semi-skilled," and "skilled."

Regulation 404.1511(e) provides that claimants are considered to have transferable skills when the skilled or semi-skilled work functions which they have demonstrated in their past work can be applied to meet the requirements of skilled or semi-skilled work functions of other jobs or kinds of work. This paragraph essentially states that transferability depends largely on the similarity of "occupationally significant work functions among jobs," but that complete similarity is not necessary to warrant the inference of transferability.

After careful consideration of the medical and non-medical evidence in this case the Administrative Law Judge concludes that none of the claimant's medical problems, whether considered singly or as a group, can be considered of such severity as to meet the definition of "disability" as contained in the Social Security Act, as amended.

The medical evidence of record reveals that the claimant has a history of back pain resulting from an on-the-job injury of many years duration. The Administrative Law Judge

does recognize that pain alone can be disabling, but that allegation does not preclude him from questioning the severity and the loss of function resulting from the alleged pain. The claimant's own treating physician, Dr. John E. Foster, diagnosed the claimant as having a disc syndrome, vertebral body disease and low back syndrome and expressed the opinion that the claimant was totally disabled but gave no clinical or laboratory findings that could support that conclusion. The claimant was hospitalized in April, 1976, because of low back syndrome but was treated with and responded to conservative measures. Both Dr. George and Dr. Daugherty in their examinations concluded that the claimant had essentially normal neurological examination and that the claimant's responses on physical examination were very much anticipatory and somewhat exaggerated. Dr. Daugherty concluded that he could not on the basis of his physical examination substantiate the severity of the claimant's complaints. The claimant did have some degenerative changes present in the L5-S1 intervertebral disc spaces and findings did not substantiate a herniated disc. Both Dr. George and Dr. Daugherty concluded that the claimant could engage in light work activity. The claimant does not take any medication for relief of pain that would interfere with thought processes. The substantial evidence of record reveals that the claimant has not suffered such a severe loss of function or disabling pain as to be precluded from engaging in all forms of substantial gainful activity. The claimant has been treated for allergic rhinitis and sinusitis, but medical reports from Dr. John Gerwin reveals that he did respond to treatment and there is nothing in the evidence of record that would indicate that the claimant has suffered any significant complications as a result of his sinus impairment.

The claimant has had prior substantial gainful activity as a telephone installer and repairman which required climbing poles and because of his back impairment, he would be precluded from returning to his former occupation. However, recent examinations of the claimant by Dr. George and Dr. Daugherty revealed that, at the very least, the claim-

ant would have the residual functional capacity to engage in light work activity.

The evidence of record reveals that the claimant is 52 years of age, defined as approaching advanced age by the regulations, has tenth grade education, defined as limited by the regulations, has performed semi-skilled work activity and does not have transferable job skills to another occupation. Based on the further finding that the claimant does have the residual functional capacity to engage in light work activity, Rule 202.11, Table No. 2 of Appendix 2, Subpart P, Regulations No. 4 applies. Since Regulations 404.1513 provides that when the findings of fact made as to all factors coincide exactly with the criteria of a rule, that rule directs a factual conclusion of "disabled" or "not disabled" as specified in the rule. Under the foregoing circumstances, the claimant must be found "not disabled."

FINDINGS

The Administrative Law Judge has carefully considered the entire record in this case, and, based upon a preponderance of the credible evidence, makes the following specific findings:

1. The claimant meets the special earnings requirement of the Act up to and including December 31, 1979.

2. The claimant is 52 years of age, defined as approaching advanced age, has a tenth grade education, defined as a limited education, can read, can write, and can handle his own financial affairs.

3. The medical evidence establishes that the claimant has suffered from old compression fracture of the 12th thoracic vertebrae, degenerative disc disease of the lumbar spine and allergic rhinitis and sinusitis.

4. The claimant is unable to perform his former job as a telephone repairman, which is semi-skilled, but does not have transferable job skills.

5. The claimant has the residual functional capacity for light work.

6. Regulation 404.1513 and Rule 202.11, Table No. 2, Subpart P, Regulations No. 4, requires that the claimant be found "not disabled."

7. The evidence establishes that on August 2, 1974, and before, as well as up to and including the date of the rendition of this decision, the claimant was not precluded from engaging in substantial gainful activity by an impairment or impairments which could be expected to result in death or which have lasted or could be expected to last for a continuous period of not less than twelve (12) months.

DECISION

It is the decision of the Administrative Law Judge that the claimant is not entitled to a period of disability or to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended, for which he filed an application of January 18, 1979.

/s/ _____

IRWIN W. COLEMAN, JR.
Administrative Law Judge

Date: MAY 8, 1980

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:
Mr. Fred. Soesbe
1006 S. Juniper Street
Foley, AL 36535

NOTICE OF DECISION—DENIAL
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within *60* days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise.

If you wish to request review, you (or your representative) should file the request at your local social security office. The people there will supply you with a request for review form and will be glad to assist you in completing the form. However, if you prefer, you may file your request for review at the hearing office or by sending a letter, requesting review, directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing
decision mailed
May 15, 1980

cc:
Name and Address of Representative:
Mr. Kenneth Cooper
124 Courthouse Square
Bay Minette, AL 36507

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of
Fred L. Soesbe
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for
Period of Disability, Disability Insurance Benefits, and Supplemental Security Income

422-28-7431
(Social Security Number)

This case is before the Administrative Law Judge on a Request for Hearing.

ISSUES

The general issues before the Administrative Law Judge are whether the claimant is entitled to a period of disability, disability insurance benefits and supplemental security income under Sections 216(i), 223 and 1614(a)(3)(A), respectively, of the Social Security Act, as amended. The specific issues are whether the claimant was under a "disability" as defined in the Act and, if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

The claimant's earnings record shows that the special earnings requirements of the Act were met on June 24, 1977, when the claimant allegedly became unable to work, and that these requirements continue to be met through the date of this decision. Therefore, the claimant must establish "disability" commencing on or before the date of this decision.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and Section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 1602 of the Social Security Act provides for the payment of supplemental security income to disabled individuals where the requirements specified therein are met.

Sections 223(d)(1) and 1614(a)(3)(A) of the Social Security Act define disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Sections 223(d)(2)(A) and 1614(a)(3)(B) further provide that an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of "such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy. . . ."

Sections 223(d)(3) and 1614(a)(3)(C) further define a "physical or mental impairment" as an impairment that results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Social Security Administration Regulations 404.1503(d) and 416.903(d) provide, in effect, that in cases where claimants with a severe impairment are not actually engaging in substantial gainful activity, they may be found disabled if their impairment or impairments meet the duration requirement and are either listed in Appendix 1, Subpart P, Regulation No. 4, or Appendix 1, Subpart I, Regulations No. 16, or are determined to be medically the equivalent of a listed impairment.

Regulations 404.1505(a) and 416.905(a) provide, as pertinent herein, that the kind and severity of the impairment or impairments determine the individual's work limitations and residual functional capacity. Furthermore, assessments

of residual functional capacity may be based solely on medical evidence where such evidence includes sufficient findings (e.g., signs, symptoms, and laboratory findings) to support the necessary judgment.

Regulations 404.1503(f) and 416.903(f) provide that where residual functional capacity is not sufficient to enable claimants to do their past relevant work, assessment is made to determine what work if any, they can do, taking into consideration residual functional capacity, age, education, and work experience.

Regulations 404.1510(a) and 416.910(a) provide that for the purpose of determining exertional requirements of work in the national economy, jobs are classified as "sedentary," "light," "medium," "heavy," and "very heavy."

Regulations 404.1511(a) and 416.911(a) provide that for the purposes of assessing the skills reflected by claimants' work experience, and of determining the existence in the national economy of work they are competent to do, occupations are classified as "unskilled," "semi-skilled," and "skilled."

Regulations 404.1511(e) and 416.911(e) provide that claimants are considered to have transferable skills when the skilled or semi-skilled work functions which they have demonstrated in their past work can be applied to meet the requirements of skilled or semi-skilled work functions of other jobs or kinds of work. This paragraph essentially states that transferability depends largely on the similarity of "occupationally significant work functions among jobs," but that complete similarity is not necessary to warrant the inference of transferability.

Regulations 404.1513 and 416.913 discuss "Appendix 2," which sets forth rules reflecting the major functional and vocational patterns which are encountered in cases in which claimants (1) are not actually engaging in substantial gainful activity, (2) do not qualify on medical considerations alone, and (3) are prevented by a medically determinable impairment from returning to their "vocationally relevant" past work. These regulations further provide, in effect, that when the findings of fact made as to all factors (age, education, transferability of skills, work experience, and

maximum level of sustained work capability) coincide with the criteria of a rule, that rule directs a factual conclusion as to whether the claimant is "disabled" or is "not disabled."

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered the evidence.

EVALUATION OF THE EVIDENCE

The claimant testified that he is 52 years of age, five feet eleven inches tall, and 195 pounds. He is married, has a driver's license, and can drive. However, he does not drive by himself. The claimant has an eleventh grade education. His hobbies were fishing and attending baseball games. A typical day for Mr. Soesbe begins around 6:30 a.m., when he gets up. He spends the rest of the day sitting around the house and visiting with his daughter.

His physical problems include pain in his leg, left arm, hand, shoulders, neck, and chest. He has difficulty in breathing, nausea, and dizziness. He also stated that exertion, such as walking and standing, causes further pain and agony.

The claimant's last work was in June, 1977. At that time he was a maintenance mechanic utilizing drills, saws, and welding and cutting devices. He also acted in a supervisory capacity, kept records, read blueprints, and used testing equipment. He has held other automobile mechanic jobs.

The claimant's daughter, Diane S. Cain a registered nurse, and his wife, Eva Soesebe, testified verifying his symptoms.

Dr. Roger C. Du Mars, vocational expert, testified that the claimant's past relevant occupation as a maintenance and automobile mechanic required constant bending and standing. This was found to be moderate work, lifting approximately 50 pounds. Both jobs would cause the claimant to have acquired transferable skills, such as using hand tools, keeping records. reading blueprints, supervising and using testing equipment.

According to the record, the claimant was referred to Dr. Farris Kimball, Jr., and Dr. John Axley by Dr. Martin H. Taylor for complaints of high blood pressure; left thigh numbness; pain in neck, shoulders, arms, and left visual field disorder. On at least two separate occasions during the course of the year of 1975, the claimant received an overall evaluation within the normal limits. A myelogram showed no abnormalities and diagnostic studies were within normal limits. Conservative treatment was utilized (Exhibits 9, 10, and 37).

Prior to the alleged onset date, the claimant was hospitalized from February 5, to February 14, 1977. He was discharged in an improved condition regarding his complaints of left lower quadrant abdominal pain (Exhibit 11). On November 3, 1977, the claimant complained to Dr. C. R. Barksdale, III, of loss of vision (Exhibit 12). Once more a general diagnosis was normal. It is the doctor's opinion that the claimant has the functional capacity to perform sedentary, light and/or moderate work activities.

Mr. Soesbe was admitted to South Baldwin Hospital, Foley, Alabama, from April 11, to April 14, 1978 (Exhibit 33). Upon improvement of the claimant's condition, he was discharged home with medication.

Dr. Taylor examined the claimant on April 4, 1979, confirming the long time diagnosis of severe hypertension, now associated with dizzy spells and personality changes (Exhibit 39).

A medical report dated May 14, 1979, by Dr. Gordon L. Spafford was based upon the claimant's complaints of chest pain (Exhibit 36). The claimant has no significant peripheral edema. He has used nitroglycerine very sparingly; yet, he is relieved within five to ten minutes if he uses it. His general evaluations appeared to be within normal limits, including his visual fields. Dr. Spafford is of the opinion that Mr. Soesbe's difficulties are precipitated by exertion. He found no objective abnormalities, and the claimant's hypertension registered moderately elevated.

From August 8, 1978, through August 19, 1978, the claimant's hospitalization related specifically to left renal lithiasis (Exhibit 34). This problem was alleviated by sponta-

neous explusion. His asymptomatic discharge home was accompanied by instructions for a low-salt diet. He was next hospitalized October 8-9, 1978 (exhibit 35). Upon improvement, the claimant was discharged ambulatory and was given a prescription for Inderal and Apresoline.

Another report by Dr. Barksdale upon completion of examination of the claimant found no peripheral vascular disease (Exhibit 38). No pulmonary impairment was documented. His visual acuity reflected 20/30 in both eyes with glasses. Mr. Soesbe was noted to have rather severe hypertension.

A medical report dated February 15, 1980, from Dr. Taylor indicated that the claimant's condition would not permit him to do any work (Exhibit 39). He was considered totally disabled and not a suitable candidate for further rehabilitation services.

The claimant testified that he had been disabled since June, 1977, due to hypertension, visual disturbances, urinary complications, loss of equilibrium and dizziness. He has been hospitalized on several occasions and takes nitroglycerine which helps to relieve his pain. He stated that he has pain in his left shoulder, neck, arm, hand, and leg.

There is no doubt that the claimant suffers from hypertension. This is confirmed on more than four different occasions (Exhibits 35, 36, 38 and 39). The claimant has related his eye problem with stress or strain. However, this condition does not appear to be so severe that it precludes all substantial gainful activity. The claimant's treating physician, Dr. Marvin Taylor, related in February, 1978, that the claimant was totally disabled and not suitable for rehabilitation services (Exhibit 39). The consultant, Dr. C. R. Barksdale, after examination in November, 1977, felt that the claimant had the ability to perform sedentary, light and/or moderate work activities (Exhibit 12).

According to the medical evidence, the claimant's hypertension and chest pain are relieved by medication. Despite what he describes as a long history of hypertension, only conservative treatment has been prescribed. The claimant received conservative treatment for his left renal lithiasis in August and October, 1978, and his stones were expelled

spontaneously in both instances. Consequently, the Administrative Law Judge finds that the evidence in this case establishes that the claimant's alleged impairments are not of disabling proportions, and he retains the residual functional capacity to perform work not requiring heavy lifting.

The claimant's past relevant work activity has been as a maintenance and auto mechanic which provided the claimant with transferable work skills. Because of the heavy lifting involved, the claimant cannot return to this work. At the time the claimant alleges disability he was 49 years of age, which is defined as a "younger individual" by Regulations 404.1506(b) and 416.906(b) and at the present he is 52 years of age, which is defined as "closely approaching advanced age" by Regulations 404.1506(c) and 416.906(c). He has an eleventh grade education which is defined as a "limited" education by Regulations 404.1507(d) and 416.907(d). Based on the further finding that he has the maximum sustained work capacity to perform sedentary work, Rule 201.11 of Table No. 1, Appendix 2, Subparts P and I, Regulations Nos. 4 and 16, respectively, applies. Since Regulations 404.1513 and 416.913 provide that when the findings of fact made as to all factors coincide exactly with the criteria of a rule, that rule directs a factual conclusion of "disabled" or "not disabled" as specified in the rule. Therefore, the claimant must be found "not disabled."

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the special earnings requirements of the Act on June 24, 1977, the date he stated he became unable to work and continues to meet them through the date of this decision.

2. The claimant has the following impairments:

(a) hypertension that causes numbness, pain in the left shoulder, neck, arm, and hand, and

(b) visual disturbances.

3. The claimant's allegation of severe disabling pain and discomfort due to his alleged impairments is not credible.

4. The claimant's impairments do not prevent him from performing work not requiring heavy lifting.

5. The claimant is unable to perform his past relevant work as maintenance and automobile mechanic. This work was moderate to heavy.

6. The claimant has the residual functional capacity for sedentary work as defined in Section 404.1510(b) of Subpart P, Regulations No. 4 and in Section 416.910(b) of Subpart I, Regulations No. 16.

7. The claimant is 52 years old, which is defined as closely approaching advanced age.

8. The claimant has a "limited" education (eleventh grade).

9. The claimant's work as a mechanic imparted skills that are transferable to work other than that previously performed.

10. Regulations 404.1513 and 416.913 and Rule 201.11, Table No. 1 of Appendix 2, Subparts P and I, Regulations No. 4 and No. 16 direct that the claimant, considering his maximum sustained work capability, age, education, and work experience, be found "not disabled."

11. The claimant was not under a "disability" as defined in the Social Security Act, as amended, at any time up to the date of this decision.

DECISION

It is the decision of the Administrative Law Judge that, based on the applications filed on February 8, 1979, and March 17, 1980, the claimant is not entitled to a period of disability, disability insurance benefits, or supplemental security income benefits under Sections 216(i), 223, and 1614(a)(3)(A), respectively, of the Social Security Act, as amended.

JOHN W. TAGGART
ADMINISTRATIVE LAW JUDGE

DATE: [May 15, 1980]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7140, 81-7143, 81-7336
81-7370 & 81-7466

D.C. Docket No.
CV80-0156-H
CV79-0730-H
CA80-0500-H
80-0638-P
80-0651-H

JOHN BROZ, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH & HUMAN SERVICES, A DEPARTMENT OF THE UNITED STATES GOVERNMENT, DEFENDANT- APPELLANT.

RICHARD D. HOLMES, PLAINTIFF-APPELLEE,

V.

RICHARD S. SCHWEIKER, THE SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

CORRINE LITTLE, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

THOMAS O. JONES, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

FRED SOESBE, PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

Appeals from the United States District Court for the Southern District of Alabama

Before GODBOLD, Chief Judge, HENDERSON and MERRITT*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED IN PART and VACATED IN PART; and that this cause be, and the same is hereby REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

June 7, 1982

---

*Honorable Gilbert S. Merritt, Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7140, et al

BROZ, ET AL,

versus

RICHARD S. SCHWEIKER, ETC., DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Southern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 4, 11 Cir., 1982, ____ F.2d ____).

Filed August 16, 1982

Before GODBOLD, Chief Judge, and MERRITT* and HENDERSON, Circuit Judges

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN C. GODBOLD

UNITED STATES CIRCUIT JUDGE

*Judge 6th Cir. Court of Appeals, sitting by designation.

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APR 15 PAGE 1

Office - Supreme Court, U.S.
FILED
MAR 16 1983
ALEXANDER L. STEVAS,
CLERK

82- 816

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOHN BROZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

OF COUNSEL:

Legal Services Corporation
of Alabama
103 Dauphin Street,
Suite 601
Mobile, Alabama 36602

QUESTIONS PRESENTED

Whether the provisions of 20 C.F.R. §404, subpart P, Appendix 2 (1981) relating to age and one's ability to adapt to a new job as applied to respondents claims sub judice were violative of petitioner's rule-making powers under the Social Security Act, 42 U.S.C. §§401 et seq?

PARTIES TO THE PROCEEDINGS

Richard S. Schweiker, Secretary of Health and Human Services; Petitioner; John Broz, Richard D. Holmes, Corrine Little, Thomas O. Jones and Fred Soesbe; Respondents.

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369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d
492 (1962) (Federal Tort Claims Act).....6

Schweiker v. Broz,
677 F.2d 1351 (11th Cir. 1982).....1,3

Schweiker v. Campbell,
cert. granted, No. 81-1983 (June 21,
1982), sub'd on oral arguments Feb. 28,
1983, 51 U.S. L.W. 3648.....1

Scott v. Imigration and Naturalization Service,
385 U.S. 214, 87 S.Ct. 473, 17 L.Ed.2d
318 (1966) (Imigration and Naturalization
Act).....5

Segel v. Rochelle,
382 U.S. 575, 86 S.Ct. 511,
15 L.Ed.2d 428 (1966) (bankruptcy).....6

Snyder v. Harris,
394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d
319 (1969) (jurisdictional amount in
controversy).....5

Tidewater Oil Co. v. U.S.,
409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d
375 (1972) (Expediting Act).....5

U.S. v. Stapf,
375 U.S. 118, 84 S.Ct. 248, 11 L.Ed.2d
195 (1963) (IRS Regulations).....6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOHN BROZ, ET AL.

Respondents do not dispute petitioner's recitation of the OPINIONS BELOW, JURISDICTION, STATUTE AND REGULATIONS INVOLVED, and statement as set forth in its brief and, accordingly, by reference adopt same herein.

REASONS FOR DENYING THE PETITION

Respondents[1] strongly disagree with petitioner's position in brief that the issue presented here and that presented in Schweiker v. Campbell, Docket No. 81-1983[2] are "substantially similar" and that the decisions below[3], "share the common

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[1]Counsel for respondents Little, Jones, and Soesbe, Messrs. Salmon, McCleave, and Simon, respectively, have authorized this writer and counsel for respondent Broz to present their position with respect to this petition. Attempts to contact counsel for respondent Holmes have not met with success.

[2]Schweiker v. Campbell, cert. granted, No. 81-1983 (June 21, 1982), sub'd on oral arguments Feb. 28, 1983, 51 U.S. L.W. 3648.

[3]Schweiker v. Broz, 677 F.2d 1351 (11th Cir. 1982); Campbell v. Schweiker, 665 F.2d 48 (2nd Cir. 1981).

conclusion that the Social Security Act somehow precludes the Secretary from declaring in regulations the effect that non-medical factors should have on the evaluation and disability." (Petitioner's Brief at 6, 7).

Campbell, supra, confined itself exclusively to that portion of 42 U.S.C. §423(d)(2)(A) relating to "work...in the national economy" and, more specifically, lists of occupations promulgated by the Secretary viz-a-viz his rule making power and which are judicially/administratively noticed in conjunction with disability claims.[4] In the case at bar, the Eleventh Circuit ruled that the foregoing list of occupations and the conclusory weight given same by ALJs was not an abuse of the Secretary's rule making powers in that, "...they refrained from determining what are fairly classified as adjudicative facts." With that, the Eleventh Circuit concluded that; "'[t]he second element [whether there are a substantial number of jobs in the national economy that a person with certain characteristics can perform] looks to conditions of the national job market. It is concerned with broad sociological data that is not related to the individual parties. It therefore concerns non-adjudicative matters." (Emphasis supplied).

Indeed, the decision below to the extent this Court is asked to issue a writ of certiorari, confined itself exclusively to the factor of age and, more specifically, the Eleventh Circuit's

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[4]See, 20 C.F.R. Part 404, subpart B, Appendix 2, §202.00(a), 203.00(a).

holding that age was, "...an adjudicative factor and therefore must be given individual consideration through adjudication rather than legislative resolution through rule making."

Given this, petitioner's overly broad and conclusory statement in brief that, "..., a reversal in Campbell would cast serious doubt on the correctness of the decision in this case" (petitioner's brief at pg. 8) is not only misleading, but incorrect.

However, for the sake of argument, and assuming that both Campbell and Broz, supra, draw into question the Secretary's rule making powers viz-a-viz the "grid system", much broader distinctions between the two decisions (which petitioner would have us believe are inharmonious with one another) become manifestly apparent:

(a) Burden Shifting

The Second Circuit in Campbell, supra noted that, [t]he central issue in this case is whether the guidelines provide adequate evidence of a claimant's ability to perform a specific alternative occupation." (Emphasis supplied). 665 F.2d at 53. In holding that the Secretary did not meet his burden by super-imposing the occupational list contained in the grid system on an individual claimant, without giving that claimant specific alternative occupations which he/she allegedly could perform, the Court's decision was tantamount to a holding that the grid system in this regard was facially infirm.[5]

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[5]Citing with approval, Bastien v. Califano, 572 F.2d 908, 912-13

Contrawise and as previously noted, the Eleventh Circuit found that the occupational list constituted a legislative or non-adjudicative set of facts clearly within the rule making power of the Secretary. In this regard, the Court concluded that;

> "[t]he regulations remove from adjudication only 'the kinds and numbers of jobs that exist in the national economy and their skill and exertional requirements'... [and] in large part, then, the regulations properly allocate legislative and adjudicative facts between rule making and the hearing."

(b) Age:

Simply put, no challenge of the grid's age brackets or their resulting effects upon eligibility or ineligibility for benefits was raised in Campbell or dealt with in that decision. Admittedly, and as previously noted, that is the focal issue at bar. However, unlike Campbell, supra which apparently found facial infirmities in the grid to the extent it related to occupational lists, the decision appealed from here only struck down the age criteria as applied to the individual respondents:

> ""because the ALJ applied [age factors] in these cases to determine conclusively these claimants' abilities to adapt to new work, the cases must be remanded for individual consideration of this factor."

Moreover, the Court refused to tamper with or invalidate the regulations relating to age or to decide how individual

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(2nd Cir. 1978); Decker v. Harris, 647 F.2d 291, 298 (2nd Cir. 1981); Parker v. Harris, 626 F.2d 225, 233-34 (2nd Cir. 1980).

considerations of the age-adjustment factor should be accomplished by ALJs. Indeed, the Court noted no fewer than two (2) means of application of the regulations as written which would result in proper non-appealable final administrative adjudications of disability claims.[6]

A commonly accepted basis for the granting of writs of certiorari is where there exists conflicting opinions among various circuit courts of appeal.[7] Petitioner, however, has not, indeed cannot, point to a single decision of any circuit court of appeals which is directly in conflict with the relatively narrow holding below. Moreover, the issue which petitioner would have this Court grapple with by granting a writ of certiorari is neither important, novel, or one of a recurring nature, and, accordingly, the granting of the writ is neither

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[6]First, where claimant's dexterity is shown to be restricted preventing him from performing a full range of sedentary work, then the corresponding sedentary grid simply has no application and the case can be decided under general guidelines. Similarly, if a claimant has a non-exertional impairment significantly limiting his work skills, then again the grids have no application. See also, Fogg v. Schweiker, unrptd., Docket No. 81-1232 (1st Cir. Oct. 13, 1981), where the Court noted another scenerio which would imbue facial validity to the age factors: "A claimant is free to show any discernable exertional or non-exertional impairment. If the effects of premature aging for an individual should rise to the level of a demonstrable or measurable exertional or nonexertional impairment, there is no bar to the introduction and consideration of evidence related to that impairment."

[7]E.g., Tidewater Oil Co. v. U.S., 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972) (Expediting Act); Hanover Bank v. C. I. R., 369 U.S. 762, 82 S.Ct. 1080, 8 L.Ed.2d 187 (1962) (Internal Revenue Code); Scott v. Imigration and Naturalization Service, 385 U.S. 214, 87 S.Ct. 473, 17 L.Ed.2d 318 (1966) (Imigration and Naturalization Act); Hopkins v. Cohen, 390 U.S. 530, 88 S.Ct. 1146, 20 L.Ed.2d 87 (1968) (attorneys fees under Social Security Act); Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d

appropriate or necessary.[8]

As noted, the holding below does not invalidate any existing provisions of the Social Security Act, an regulations or guidelines promulgated by the Secretary pursuant thereto, or any procedures for the actual adjudication of disability claims before administrative law judges. Indeed, the continued efforts of the Secretary to seek judicial review of any and all lower court decisions allowing claimants to present testimony in support of their claims as it relates to adjudicative matters, must be perceived as an administrative decision on his part to restrict and retard the number of persons to be placed on the social security disability roles.

CONCLUSION

Based upon the foregoing points and authority of law, it is respectfully urged by respondents that petitioner's petition for writ of certiorari to the Eleventh Circuit be denied.

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319 (1969) (jurisdictional amount in controversy); Richards v. U.S., 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962) (Federal Tort Claims Act); Segel v. Rochelle, 382 U.S. 575, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966) (bankruptcy).

[8]E.g., U.S. v. Stapf, 375 U.S. 118, 84 S.Ct. 248, 11 L.Ed.2d 195 (1963) (IRS Regulations); Reading Co. v. Brown, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968) (bankruptcy); Kussick v. United Fruit Co., 375 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961) (maritime law); Costella v. Imigration and Naturalization Service, 376 U.S. 120, 84 S.Ct. 376, 11 L.Ed.2d 559 (1964)(Emigration & Naturalization Act).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 15th day of March 1983, served a copy of the above and foregoing Anne Buxton Sobol, Assistant U.S. Attorney General, Department of Justice, Washington D.C. 20530.

JOSEPH E. CARR, IV